CASES AT LAW

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA.

JUNE TERM, 1847.

JOSEPH DOUB *vs.* JOSEPH HAUSER, Adm'r.

In an action of debt upon a bond, where the defendant has pleaded several pleas, and among others the plea of *non est factum*, and the jury find all the pleas in favor of the defendant, this Court is concluded by that verdict and cannot inquire into the instructions of the Court below, as to the other pleas, whether those instructions were erroneous or not.

The cases of *Morrisey* v. *Bunting*, 1 Dev. 6, *Bullock* v. *Bullock*, 3 Dev. 268, *Martin* v. *Waugh*, 2 Dev and Bat. 518, cited and approved.

Appeal from the Superior Court of Law of Stokes County, at the Spring Term, 1847, his Honor Judge MANLY presiding.

This was an action of debt, brought in 1844, upon a bond for $668, due 2d June, 1826, purporting to be executed by Noah Ward, William J. Ward, Elijah Ward and Henry Doub. Pleas: *Non est factum*, and the Statute of 1826, raising a presumption of payment upon

bonds after ten years from the day of payment. It was in proof, that in the year 1831, three of the obligors, to-wit: Wiley J. Ward, Elijah Ward and Henry Doub, had sent the bond to Tennessee, with a power of Attorney from them to collect the debt of Noah Ward, who it appeared, was the principal obligor.

And, in the further progress of the cause, the plaintiff offered in evidence, upon the issue under the Statute, as admissible and pertinent to repel the presumption created thereby, an exemplification of a record from Tennessee of one of the Courts in that State, in a cause between himself, the plaintiff in this cause, and Noah Ward; wherefrom it would appear, that a recovery had been effected upon the bond now in suit, and in the year 1840 the sum of $600 made upon a *fi. fa.* on the Judgment.

This evidence was objected to, and the Court, deeming it inadmissible, so ruled; for which the plaintiff excepts. In obedience to instructions from the Court, the Jury found a verdict for the defendant, and the plaintiff appealed from the judgment thereon.

No counsel for the plaintiff.

Morehead, for the defendant.

NASH, J. It was an action of debt on a bond. The defendant pleaded, *non est factum*, payment and set off, accord and satisfaction, release, *solvit ad diem* and *solvit post diem*, the Act of 1826–7, presuming payment, &c. To rebut the presumption of payment, the plaintiff offered in evidence a judgment recovered in his name upon this bond against Noah Ward, the principal obliger, but upon which there had been a partial payment only, made in the year 1840. The action against Ward was commenced in 1831. This testimony was rejected by the presiding Judge, and under his instructions the jury found a verdict for the defendant.

In the case presented to us, it appears that the jury found all the issues in favor of the defendant, and of

course passed upon their plea of *non est factum*. That finding puts an end to the case, for the jury have said it was not the deed of the defendant. It is unnecessary to express any opinion, as to the correctness of the presiding judge in ruling out the testimony offered by the plaintiff. We are precluded from so doing, by several adjudications of this Court, *Morrisey* v. *Bunting*, 1 Dev. 6. *Bulloch* v. *Bulloch*, 3 Dev. 260. *Martin* v. *Waugh*, 2 Dev. and Bat. 518.

PER CURIAM. Judgment affirmed.

DOE EX DEM. DANIEL McPHAUL'S HEIRS *vs.* JOHN GILCHRIST

Where a grant called for certain courses and distances, and from the last (the third line,) "thence No. 87 W. 199 poles to a hickory, thence the *courses of the Swamp* to the beginning." *Held*, that though the distance from the last corner to the Swamp gave out nine chains and fifty links from the Swamp, and no hickory corner was to be found, nor was there any proof of its existence, yet the line should be extended to the Swamp and thence pursue its courses.

Held further, that the declaration of an owner of the land, that his fourth line run from the termination of the distance mentioned in the third line, directly to the beginning, did not of itself divest him of his title to the land, lying between that line and the Swamp.

Under our confiscation of laws, in the absence of commissioners or other officers appointed by law for that purpose, the County Court had no authority to seize, condemn and sell the property of any Tory of the Revolution, then dead, without notice to his heirs.

The cases of *Den ex dem. Sandifer* v. *Foster*, 1 Hay. 277, *Hartsfield* v. *Westbrook*, 1 Hay. 258, and *Pender* v. *Coor*, 2 Hay. 183, cited and approved.

Appeal from the Superior Court of Law, of Robeson County, at the Spring Term, 1847, his Honor Judge BATTLE presiding.

This was an action of ejectment to recover the possession of a small parcel of land, of which it was admitted that the defendant was in possession.

The plaintiff claimed under a grant to James Pace, made in 1760. They could show no conveyance from James Pace, but they produced a deed from William Pace to Richard Smith, dated 1763, and a deed from the said Smith to Neil McPhaul dated 1772, in both which deeds the same description was given as in the grant to James Pace. The plaintiffs then introduced as a witness, Mrs. McArthur, who testified that she was a daughter of Neil McPhaul, that her Father died about the close of the Revolution prior to the year 1784, leaving Daniel McPhaul his eldest son; that her father was a Tory Captain and died in Charleston, in the service of the British Government, that her mother resided on a different tract of land, from that which her father bought of Richard Smith, and that the witness and her brother made a crop about the time of the death of her father, with the permission of her mother, on the Smith land; that shortly afterwards her brother married and settled on the land bought of Smith, and continued to reside on it from that time until his death, since the commencement of this suit. Mr. Campbell, another witness for the plaintiffs, also proved that Daniel McPhaul was the eldest son of Neil McPhaul, and that he took possession of the land, which his father bought of Smith, in less than five years after the Revolution and continued to reside on it until after the commencement of this suit. The plaintiffs then introduced one of the surveyors, Mr. Fauly, who testified that the beginning corner of the grant to James Pace was admitted; that he found a red oak standing there marked as a corner with marks apparently corresponding with the age of the grant; that he ran the courses and distances called for as the first, second, and third lines of the grant, but he found no marked trees on either of said lines; that a corner was marked at the end of the

second line, but apparently of a very recent date; that he found no hickory or any other tree marked, as a corner at the end of the third line, which was nine chains and fifty links from the white oak swamp on the direct line to it. The plaintiffs contended that the call for the fourth line of the grant to Pace which was from the fourth corner, "thence the courses of the swamp to the beginning," entitled them to go from the end of the third line in a direct line to the swamp, and thence along the edge of the swamp to the beginning, which would include the land in dispute, and they insisted that the swamp was intended as the western boundary of their land.

The defendant claimed under a deed of recent date and contended that the line was the fourth from the corner of the third line direct to the beginning line of the plaintiff's grant, both because that was the proper construction of the call of the fourth line under the grant to Pace, and because Daniel McPhaul recognised it as the line of his land, and to establish this fact, he introduced Mr. Campbell, who testified that he was the brother-in-law of Daniel McPhaul, that the witness owned a seventy acre tract of land adjoining, and that Daniel McPhaul never claimed that his third line ran through witness' said land; that some thirty or forty years ago he heard Daniel McPhaul say, that the line represented as running directly from the end of the distance of the third line, was his line and saw some marked trees upon it, but they were fresh marks. Neil Patterson, another witness for the defendant, testified that he was living with Daniel McPhaul in 1838 and 1839, and, being a blacksmith, he wanted some coal and asked Malcolm McPhaul, a son of Daniel, and now one of the lessors of the plaintiffs, whether he could not make it from the tops of certain pine trees, which the defendant had cut down in clearing a field within the disputed ground, when Malcolm told him that he would have to ask the defendant for the privilege of taking them.

The defendant contended further, that the plaintiffs had no title to the land, which they claimed, because it had been confiscated by the State in the year 1782, as the property of Neil McPhaul, on account of his having joined the enemy; and introduced a record from the office of the County Court of Bladen County, a copy of which is sent as a part of this case.

The Court held, that the judgment of confiscation relied on, did not take away the title of the plaintiffs, because at the time it was given, the title of Neil McPhaul had descended to his oldest son and heir at law, Daniel, and that Daniel was entitled under our constitution to a trial by jury before his title could be divested; and further, that though the Court declared the said land to be confiscated, it had never been taken possession of by any officer for the State. The Court held further, that the call in the grant to Pace, which was also contained in the deeds from William Pace to Richard Smith, and from him to Neil McPhaul, carried the fourth line to the swamp, and along the edge of the swamp to the beginning, and that the evidence introduced by the defendant, to show that Daniel McPhaul only claimed to the line mentioned before, did not divest him of his title to the piece in dispute, in the absence of any conveyance from him or an adverse possession held under such circumstances as would give title to the possessor. The jury returned a verdict for the plaintiff, and the defendant moved for a new trial for error in the charge of the Court. Motion over-ruled, and judgment for the plaintiff, from which the defendant appealed.

[*Copy of the Record from the County Court of Bladen.*]

"STATE OF NORTH CAROLINA, }
BLADEN COUNTY. }

At a County Court of Pleas and Quarter Sessions held for the County of Bladen on the first Monday of August, 1842. Present, &c.

The widow of Neil McFall, being cited to appear before this Court, to shew cause, if any she has, why the estate of her husband, Neil McFall,

should not be forfeited, and the said widow acknowledged that her husband had joined the enemy of this State and acknowledged the right of confiscation, and the Court were of opinion that the said McFall's estate be confiscated."

Copy of record certified in the usual form.

Strange, for the plaintiffs.
Badger, for the defendant.

Daniel, J. The lessors of the plaintiff claimed all the land, contained within the boundaries of a grant made in the year 1760, to James Pace, lying on the east side of Drowning creek, beginning about a mile above Overstreet's bridge at a red oak, thence 87 E. 179 poles to a pine, then S. 3 W. 179 poles to a pine; thence N. 87 W. 179 poles to a hickory; thence the courses of the swamp to the beginning. The distance mentioned in the third line gave out nine chains and fifty links from the swamp; there was no hickory corner to be found, nor any proof of its existence. The Judge charged the jury, that the call of the fourth line of the grant from the hickory, "*thence the courses of the Swamp to the beginning*," entitled them to extend the third line to the swamp, (a natural boundary,) and thence along the swamp to the beginning *red oak*. This part of the charge we think was correct. In *Den &c. Sandifer* v. *Foster*, 1 Hay. Rep. 247, the call of the last line was, "thence along the river to the beginning;" the *river* was held to be the boundary, although the line coming towards the river called for a *white oak* at its termination; which was half a mile distant from the river. *Hartsfield* v. *Westbrook*, 1 Hay. 258, *Pender* v. *Coor*, 2 Hay. 183.

2dly. The Judge charged that the declaration of Daniel McPhaul, that his fourth or west line ran from the termination of the distance mentioned in the third line, to the beginning red oak, did not divest him of his title to the land, lying between that line and the swamp, in the

absence of any conveyance from him, or adverse possession, held under such circumstances as would give a title to the possessor. We see no error in this part of the charge. If the land in dispute belonged to Daniel McPhaul, he could not part with the title to it by parol. Nor was his admission binding on him and those who claim under him, if they were made under ignorance or a clear mistake of his rights.

3dly. Neil McPhaul, in the year 1772, purchased the land mentioned in the aforesaid patent of Richard Smith. Neil McPhaul died about the close of the Revolutionary War, and before the year 1784, leaving Daniel McPhaul his eldest son and heir at law. The heir entered on the land, shortly after the death of his father, and continued to reside on it from that time to the commencement of this suit. Neil McPhaul was a Tory, and died a captain in the service of the British Government. The County Court of Bladen, at its August sessions, 1782, entered a judgment of confiscation of the estate of Neil McPhaul, as is mentioned in the case. The Legislature had, by the confiscation acts, declared that the lands of all such persons, as adhered to and aided the enemy, by taking up arms in their favor, should be forfeited. Commissioners of confiscation were directed to be appointed in each county, who were to give bond and take an oath faithfully to perform their duties. The duties of these Commissioners, was to take possession of lands and moveable property, in the name, and for the use of the State, which, by the Act of Assembly, were declared to be forfeited to the State; and to sell the same, and make titles to the purhasers, and account for the purchase money. The Act of 1780, ch. 170, (*Rev. Code,*) enacts, that for want of Commissioners of forfeited estates in each county, the Sheriff or Coroner, and where there is no Sheriff or Coroner, the County Court is hereby strictly enjoined to seize and take into their possession, all such property as has been described in the said Act.

If the Court was authorized to act in the place of Commissioners, and if the order could be construed to *include* this piece of land, it condemned the land to confiscation, without any notice to the heir to defend, which was contrary to law. And, moreover, the land was never seized to the use of the State, by any officer or person, but remained in the actual adverse possession of the heir for more than sixty years before this controversy arose. We think, that the title of Daniel McPhaul never was divested, by any office found in the mode pointed out by any of the confiscation Acts. The judgment is affirmed.

PER CURIAM. Judgment affirmed.

JOHN SMITH *vs.* EBENEZER INGRAM & AL.

Where surveys are made on any navigable water, the water shall form one side of the survey. And any island or islands in any navigable water may be entered, surveyed and granted.

Where land is subject to entry and has been granted, the action of Trespass Q. C. F. lies, although the land is covered with water.

Where land is lapped by two deeds or grants, the adverse possession for seven years by a person, not being in possession of the lapped part, can give him no right against the superior title to the part so lapped.

One, who is in the actual or constructive possession of land, may recover damages from him, who dispossesses him, tho' not in possession at the time of the action brought. No ulterior profits or damages can be recovered, until he regains the possession; and then the law, by relation, would adjudge him to have been in possession from the first ouster, and entitle him to damages for all the time the defendants wrongfully held the lands.

The cases of *Carson* v. *Burnett*, 1 Dev. & Bat. 54, and *Graham* v. *Houston*, 4 Dev. 232, cited and approved.

Appeal from the Superior Court of Law of Anson County, at the Spring Term, 1847, his Honor Judge BATTLE, presiding.

This was an action of Trespass *quare clausum fregit*, to which the defendant pleaded the general issue and *liberum tenementum*.

The plaintiff produced a grant, under which he claimed and which covered the *locus in quo*, dated in 1796, and then shewed a regular chain of conveyances to himself. The plaintiff's grant included some small islands, rocks, shoals and the bed of Pedee river, where it is not navigable. It was in proof that the defendants, in the Fall of 1836, erected a dam and put in a fish trap, at the place in dispute, and which is within the boundaries of the plaintiff's grant. It further appeared that they kept up this dam and continued to fish there, until the Spring of 1839, but whether they continued to do so, up to the time when the action was commenced in the month of July of that year, was matter of dispute upon the testimony. It was in evidence on the part of the plaintiff, that he erected a dam and put in a fish trap at or very near the spot, where the defendants' dam had been erected, in the Spring of 1839, and that the defendants took out his trap and carried it off. The plaintiff claimed damages for the trespass committed by the defendants in erecting their dam in 1836, and for taking away his fish trap in 1839.

The defendants claimed title to the *locus in quo* under a deed from one Terry to Slaughter, exeuted in 1824 and a deed from the latter to E. Ingram made in 1836. The deed, under which the defendants claimed, included part of the same land as that covered by the plaintiff's grant and included the *locus in quo;* and they proved, that those, under whom they claimed, had erected a dam, for the purpose of putting in a fish trap, on a part of the premises included in their deed, but not on the lapped part, and had used it for the purpose of catching fish for more than seven years before the suit was commenced. It did not appear that the plaintiff, or those under whom he claimed, ever had actual possession of the premises, included in his grant, until he erected his dam in 1839.

The defendants objected to the plaintiff's recovery. 1st. That the plaintiff's grant was void, because the place granted was not subject to entry. 2nd. That the seven years' possession of Terry and those claiming from him under color of title, though not upon the lapped part, gave them a good title to all the land within the boundaries of their deed and of course to the *locus in quo*. 3rd. That the plaintiff was not in possession of the *locus in quo*, at the time of the commencement of his suit.

The Court held that the first and second objections were untenable—that, as to the third, the plaintiff was entitled to recover for the entry by the defendants to erect their dam and put in their fish trap upon his premises in 1836; that, if the defendants were in actual possession of the *locus in quo* in 1839, when the suit was commenced, it could not be sustained for damages then committed, but that if the defendants had abandoned the possession of the *locus in quo* in the Spring of 1839, and the plaintiff then entered and erected his dam and put in his fish trap, and the defendants afterwards took the trap and carried it away, he might recover damages for that injury also. The plaintiff had a verdict and judgment and the defendants appealed.

No counsel for the plaintiff.
Strange, for the defendants.

Daniel, J. Where surveys are made on any navigable water, the water shall form one side of the survey. And any island or islands in any navigable waters may be surveyed and granted. *Rev. Stat. ch.* 42, *sec.* 1. The grant, dated in 1796, under which the plaintiff claimed the land, does not cover any navigable water, whether we are to understand that term in its common law sense, or according to any meaning it has received in this State. The *locus in quo* was, we think, subject to entry and grant. And this action is well brought, for it lies, although

the land is covered by water. *Co. Lit.* 4, *Yelver* 143. *Secondly*, we are of opinion, that the seven years possession of Terry and those under whom the defendants claim, under a color of title (not being on the *locus in quo* or on that part of the land, where the deeds of the respective parties lap on each other) did not give them a title to any part of the land contained in the lap, as the title of the plaintiff was the elder and better title and extended to the boundaries mentioned in his grant and deeds; and as no adverse possession interfered with him within the scope of his boundaries. *Carson* v. *Burnett*, 1 *Dev. & Bat.* 546. The plaintiff, and those under whom he claims, were never at any time ousted of any portion of their land, so as to be put to their right of entry. The defendant and those under whom he claims had never taken any possession of the land claimed by the plaintiff, so that an action of ejectment could have been maintained against him or them. How then can it be contended, that a possession by Terry and the defendants of land, which the plaintiff never claimed or had any title deeds to cover, could be an actual adverse possession of those lands, or any part of them, lying within the boundaries of the plaintiff's grant and deeds? It cannot be so. If the defendants, or those under whom they claim, or either of them, had entered on that part of the land comprised in the lap, and continued in actual adverse possession for seven years of that, the plaintiff's right of entry would have been tolled as to that; and then the defendant's inferior title to the *lapped* part would have become the better title to that part. *Thirdly*, we think the charge of the Judge was correct upon the third point. The plaintiff was constructively in possession of the *locus in quo*, as he had the possession by virtue of the legal title, and the action of trespass *quare clausum fregit* is always brought, to recover damages for any injury to the plaintiff's possession of lands. The unlawful entry of the defendants upon the plain-

tiff's land, and then and there erecting the dam in the year 1836, was an injury to his *then* constructive possession. And although the plaintiff might not have been in possession of the land, either actually or constructively at the time of the issuing of his writ, he nevertheless might well maintain this action, if he was in possession of the *locus* at the time the injury or trespass was first committed by the defendants; for it is the damages sustained by the plaintiff, by the very act of dispossessing him of his land by the defendants, that he now seeks to recover. He was injured in his possession by that very act. *Graham* v. *Houston*, 4 Dev. 232. No ulterior profits or damages, it is true, could be recovered, until he regained his possession; and then the law, by relation, would adjudge him to have been in possession from the first ouster and entitle him to recover damages for all the time the defendants had wrongfully held the lands and kept him out of possession. If a man is disseized he may bring trespass against the disseizor, for the *act of disseizin*. 2 *Rolle's Abr.* 553. *Co. Lil.* 257 (a.) *Com. Dig. Trespass*, B 2. *Roscoe on actions*, 663. And, if he re-enter, he may have trespass against the disseizor or a stranger, for continuing in possession, for by the re-entry he re-vests the possession in himself, *ab initio*. *Roscoe on actions*, 663, 664, and the cases there cited.

PER CURIAM. Judgment affirmed.

THE STATE *vs.* JAMES S WHITE.

In an indictment for a libel, charging that the prosecutor "was called a murderer and foresworn," it is not competent for the defendant to justify by proving that there was and long had been a general report in the neighborhood that the prosecutor was a murderer and foresworn.

The case of *Hampton* v. *Wilson* 4 Dev. 568, cited and approved.

Appeal from the Superior Court of Law of Craven County, at the Spring Term, 1847, his Honor Judge PEARSON presiding.

The defendant was indicted for publishing a libel of the prosecutor. It appeared, that the prosecutor had made a publication, in which the defendant was mentioned, and the defendant, in replying to it, published the writing containing the libellous words. They were as follows:—"He forgot to tell the people that he is called a murderer and foresworn, &c." The counsel for the defendant in justification offered to prove, that, at the time the writing was made and published, and for many years before, there was a general report in the neighborhood, in which the prosecutor and he lived, that the prosecutor had murdered one of his slaves and was foresworn. The Court decided that the proof would not sustain the defence—that, if there was such a report, the defendant was not at liberty to give currency to it, and put it into the shape of a libel, and that to sustain the plea of justification, it was necessary to prove that the prosecutor had committed murder and was foresworn. Under this charge the defendant was convicted and appealed to this Court.

Attorney General, for the State.
No counsel for the defendant.

NASH, J. We concur in the opinion of his Honor in the Court below. The evidence was offered under our Statute, passed in the year 1803, *Rev. St. ch.* 35, *sec.* 13,

which gives a defendant, charged by indictment with the publication of a libel, the right to prove on the trial the truth of the charges in the libel. To ascertain the meaning of the Act, in permitting the truth of the facts alleged to be given in evidence, it is necessary to see what was the law as to the justification of slander, both oral and written, at the time of its passage. Oral slander has ever been considered as a civil injury, to be redressed by a civil action; and the defendant was always at liberty to defend himself by proving on the trial that the words spoken were true, that is, that the plaintiff was guilty of the offence, with which he had charged him, and it was essential to the validity of his plea, that it should aver the guilt of the plaintiff in the act charged. 3 *Chit. Plead.* 1032. But this was not the case in prosecutions for libels. At no time, by the common law, could a defendant give in evidence the truth of the facts, which he had published of the prosecutor, and for the reason that a libel tends directly to a breach of the public peace. Whether, therefore, the individual, of whom he made the publication, was guilty or not guilty of the charge, the danger to the public peace was none the less great. This continued to be the law of North Carolina until the Act of 1803, above referred to. The truth, which that Act gives to a defendant in a prosecution for a libel the right to show, is the truth, which defendants were at liberty, under the plea of justification in civil suits for words spoken, to give in evidence. I have been able to find no case, in which the slander consists of rumor, where the defendant has been permitted to justify, by showing, that, at the time he uttered or published the slander, there was such a rumor or report. The nearest that any case has come to it is, where the defendant gives the name of the person, from whom he heard it, at the time of the utterance or publication. This was ruled by Lord KENYON in the case *Davis* v. *Lewis*, 7 Term R. 17, and in the Resolution of the Judges in the *Earl of Northampton's* case,

12 Co. 132. But the authority of both these cases, as to that point, has been questioned, not only in this Country, but in England. Chancellor Kent, in the case of *Dole* v. *Lyon*, 10 Johns. 449. which was an action for a libel, in remarking upon these cases observes, "but in neither of those cases was this the point in judgment, and it may well be questioned, whether even this rule, as to slanderous words, ought not to depend upon the *quo animo*, with which the words with the name of the author are reported." In the case of *Lewis* v. *Walter*, 5 Eng. C. L. Rep. 539, 4 Barn. & Ald. 615, the doctrine in the *Earl of Northampton's* case is more than questioned by all the Judges. Mr. Justice Holroyd, after remarking at considerable length upon the *dictum* in that case, tells us what he understood to be the meaning of Lord Coke. "It is observable, says he, that Lord Coke does not say, that it is lawful to repeat slander in all cases and at all times, but only that a party may justify under certain circumstances. It must not, therefore, be taken as a general rule, even in oral slander, that the malicious repetition of it may be justified, if the name of the author be given up at the time." The doctrine upon this subject was elaborately considered in the case *Hampton & Wife* v. *Wilson*, 4 Dev. 468. That was a case of oral slander. The evidence was, that the defendant had said that it was reported the *feme* plaintiff was incontinent. The defendant attempted to justify by proving the existence of such a report at the time he spoke the words. It was ruled by his Honor, Judge Strange, on the circuit, that the existence of the report would not justify its repetition by the defendant and would not avail him on his special plea; and upon appeal to this Court the judgment was affirmed. His Honor, the Chief Justice, in delivering the opinion of the Court observes, "The justification does not consist, merely in the facts, that the defendant heard the words and gave up his author, for that gives him no right to repeat them, if false; especially, if he knew them to

be false and with intent to cause the guilt of the plaintiff to be believed. Such conduct makes him the endorser of the slander, &c." The reason given by Lord KENYON, for his opinion in the case of *Davis* v. *Lewis*, is, that, by giving the authors' name, at the time of uttering the slander, he thereby gives to the plaintiff a person to answer to his action. A very insufficient reason, but insufficient as it is, totally inapplicable to general rumor. Against this oft-times many headed monster, the slandered individual can, in the nature of things, have no redress, while the injury to him is spread wider and deeper by every thoughtless or malicious tongue, which chooses to repeat it. The law, while careful that the liberty of speech and of the press shall be duly preserved, is equally solicitous to protect every man in his fair fame and character. In speaking of written slander, in connexion with a justification by giving up the name of the person, from whom it was received, CHANCELLOR KENT, in the case of *Dole* v. *Lyon*, says: "There is no existence of such a justification in an action for a libel." The Legislature, then, in authorizing the truth to be given in evidence by the defendant on the trial of indictments for libel, must have meant, that the justification should have been such, as would have proved an adequate defence at common law in actions for verbal slander. It was nothing more than to extend to the defendant on prosecution, the same defence, as he would have, if called to answer for the private injury. All persons, who concur in doing an unlawful act, are guilty, and equally answerable to the State, when the injury is to the public, and to the individual, who may receive injury from the act. That the publisher of a libel cannot protect himself, by giving up the name of the author, is shewn by the precedents in our books and the practice of our Courts. The cases are many, where the publisher of a newspaper is held answerable, even when the libel is published with the name of the author. And if giving the name of the author, of

him who writes the libel, will not justify him, who makes it public, much less will the publisher be justified by giving, as his authority, that perfectly irresponsible personage, common rumor. In this case, the malice of the defendant, an essential ingredient in his offence, is apparent from the terms of the publication and the excuse as avowed.

RUFFIN, C. J. The defendant did not attempt to excuse his publication by evidence, that he made it from a different motive, than the malicious one of defaming the prosecutor, imputed to him in the indictment. He insisted simply, that he was justified by the truth of his words. The single question, then, is, whether a person, with a view to injure the character of another, can publish of him, in writing or print, as a general rumor, that he has been guilty of a felony or of some infamous offence, and justify the publication by evidence of the rumor, and without any proof of the guilt of the person? The very stating of such a proposition in the affirmative shocks the understanding and the sense of what is due to innocence.

It has long been settled, in regard to a private action for such a publication, that the action would lie, "although that in truth the party might hear" the scandalous words from others. *The Earl of Northampton's case*, 12 Rep. 134. That case was followed by that of *Hampton* v. *Wilson* in this Court, 4 Dev. 468. Lord COKE assigns, as a reason for the rule, that a person of no estimation might have spoken the words, "and if it should be lawful for a man of credit to report them generally, *that* would give greater color and probability that they were true, in respect of the credit of the reporter." The remark is founded in good sense and a knowledge of the heart. The publication of such an imputation, though as a general rumor, can only be intended to obtain, in some degree, credence in the truth of the charge. Therefore the reporter ought to be required to establish its

truth, or show some other motive for circulating it, than that of defamation merely.

The same reasons apply with equal force to an indictment, as to an action, for a libel. The publication imparts to the rumor the credit of the reporter, so as to give that color of probability to the accusation, which his name can procure for it; and it tends as directly to provoke a breach of the peace, as if he had affirmed the truth of the charge. As far as the authority of the publisher was intended to sanction the report or give credit to it, to that extent the publication of the rumor is substantially the assertion of its truth. It certainly cannot be understood, that he published it, *as a false report*. Then he must have meant the world to believe, that there was some ground of truth for the rumor; and, in order that it might be the more readily believed, he gave it the sanction of his name. Such conduct is not only a grievous wrong to the good name of an innocent man, but not less seriously endangers the public peace. The Act of 1803 has no effect on this question. It merely allows the truth of a charge to justify it, upon an indictment for a libel, and, in that respect, puts an indictment and a civil action on the same footing; which was not so at common law. The Legislature did not mean, that a person should be liable for a libel, at the private suit of the citizen, because the defendant could not prove the truth of a report published by him, and yet that he should not, for the same reason, be liable on an indictment for the very same publication. In fine, it could not have been intended, that a person, from ill will to another, might with impunity circulate general reports of scandalous falsehoods respecting the other. Such a rule would give free scope to the worst passions and continually embroil society.

Per Curiam. Ordered that a certificate and copy of these opinions be sent to the Court below that they may proceed according to law.

DEN EX DEM. T. L. WILLIAMS & AL. *vs.* JOHN MILLER.

If two grants lap and one of the claimants be seated on the lapped part, and the other not, the possession of the whole interference is in the former exclusively—possession of part of the lands included in both deeds being possession of all of it.

The cases of Green v. *Harman*, 4 Dev. 158, *Dobbins* v. *Stephens*, 1 Dev. & Bat. 5, *Carson* v. *Burnett*, 1 Dev. & Bat. 516 and *Williams* v. *Buchanan*, 1 Ired. 535, cited and approved.

Appeal from the Superior Court of Law of Stokes County at the Spring Term 1847, his Honor Judge MANLY, presiding.

Upon the trial of this ejectment the plaintiff read, in evidence, a grant to Joseph Williams, the ancestor of the plaintiffs' lessors, bearing date in 1755, and proved the defendant to be in possession of part of the land covered thereby. In his defence the defendant read a grant to himself bearing date in 1761, and offered evidence to prove that it covered all the land, of which he was in possession. If that was true, then there was a piece of land covered by both patents; and it appeared that the two patentees, and those claiming under them, had been in actual possession, respectively, for upwards of fifty years, of those parts of their several tracts, not included within the lap, as insisted on by the defendant. The defendant then further offered evidence, that, twelve years before this suit was brought, he cleared a portion of the lapped land and had kept it enclosed and cultivated ever since. On the part of the plaintiff, evidence was offered that the grant to the defendant was bounded by the lines of the grant to Joseph Williams, and that there was no interference of the two patents. And the plaintiff further proved, that, about three years before this suit, the defendant enlarged his clearing and enclosure and took in another portion of the land within the lap, if the two patents did interfere, as the defendant contended.

Upon this evidence the counsel for the plaintiff insisted before the jury, that the line of the two tracts was the same, and that the grant to Miller did not cover so much of the land, in the possession of the defendant, as is covered by the grant to Williams; and, therefore, that the plaintiff had a right to recover. And upon that point, the Court instructed the jury, that if they should find that the land in possession of the defendant, which was claimed by the plaintiff, was not covered by the grant to the defendant, then they should find for the plaintiff. The plaintiff further insisted, that, if the jury should believe that the defendant's patent did cover all the land in his possession, yet that would give him a title only to such part of the land, which was also covered by the grant to Williams, as the defendant had been in actual and continued possession of by enclosure for seven years; and, therefore, that the more recent enlargement of the defendant's field entitled the plaintiff to a verdict in this action. But the Court instructed the jury, that the possession of the defendant within the lapping of the patents for seven years (the lessors of the plaintiff having no possession therein) was a possession of the whole lap, and gave the defendant a good title thereto.

Upon the trial, the plaintiff produced a witness, who deposed that, about fifty years ago, Joseph Williams surveyed the line, which the plaintiff now claims as that between him and the defendant, and then claimed it as the line of his patent. And the plaintiff offered further to prove by that witness, that, when the line was run, the surveyor began at a point on the Yadkin river, which was some distance from the line, and that said Williams then stated, "why it was necessary to begin at that point on the Yadkin, in order to strike the line;" but, being objected to by the defendant, the Court excluded the evidence of these declarations.

There was a verdict for the defendant, and from the judgment the plaintiffs appealed.

No counsel for the plaintiffs.

Norwood, for the defendant.

RUFFIN, C. J. The instructions of his Honor were undoubtedly correct. As the case stands upon the exception, it is to be assumed, that the line of the Williams grant was where the plaintiff claimed; and, where, indeed, the defendant admitted it to be; but it is to be assumed also, that the line of the defendant's grant was where he claimed it to be, and where the plaintiff denied it to be: so that in point of fact there was, according to the expression that has come into common use, a lapping of the grants upon each other. In such a case, the law has been held in many cases to be, that if one of the claimants be seated on that part, and the other not, the possession of the whole interference is in the former exclusively—possession of part of the land included in both deeds, being possession of all of it. *Green* v. *Harman*, 4 Dev. 158. *Dobbins* v. *Stephens*, 1 Dev. & Bat. 5. *Carson* v. *Burnett*, 1 Dev. & Bat. 546. *Williams* v. *Buchanan*, 1 Ired. 535. As the defendant thus had the possession, for seven years, of the whole of the land covered by both grants, he acquired a good title to the whole, though his was the junior grant.

The plaintiff cannot have a reversal of the judgment for the rejection of the declarations of Williams, as to the reasons for beginning to survey, not on any line of his tract, but at a place on the Yadkin, at some distance from the land. In the first place, the plaintiff has not set forth in his exception, what the reasons declared were; and it is therefore impossible to determine, whether they were relevant, or not, to any point in controversy. It is incumbent on the appellant to show the relevancy of the declarations, in order to establish an error in rejecting them. But the case is even stronger than that against the plaintiff, for, as far as the nature of the declarations can be conjectured from the circum-

stances, they must have been irrelevant or incompetent. If the object was to show that Williams then claimed the line, which the plaintiff now does, as the line of his patent, the evidence was wholly immaterial; inasmuch as the defendant did not at all deny that to be Williams' line, but admitted it throughout, and put his case entirely upon the title gained under the statute of limitations by a possession of more than seven years, under the color of his own grant. If the object was to prove by those declarations where the line of the defendant's patent was, they were manifestly incompetent for that purpose; for, upon a question of boundary, it cannot be competent for one claimant to prove by his own declarations at a former period, what is the ambit of his adversary's deed. In every point of view, therefore, there does not appear to have been an error in ruling out those declarations.

PER CURIAM. Judgment affirmed.

ABEL COHOON & AL. vs. EDMUND SIMMONS & AL.

In order to entitle one to maintain trespass *quare clausum fregit*, where he has no occupation of any part of the premises, he must show a title in himself from which the law can deduce, that, constructively, he has the possession.

The case of *Carson* v. *Burnett*, 1 Dev. and Bat. 546, cited and approved.

Appeal from the Superior Court of Law of Tyrrell County, at the Spring Term, 1847, his Honor Judge CALDWELL presiding.

This is an action of trespass, *quare clausum fregit*, for entering into the premises and cutting down certain tim-

ber trees to make shingles, and was tried upon "not guilty" pleaded. The plaintiffs gave in evidence a grant from the State dated in 1833 for the *locus in quo*, under which they claimed. The defendants then gave in evidence a grant for the premises from the State to Josiah Collins, bearing date in 1796. The plaintiffs, thereupon, moved the Court to instruct the jury, that they were entitled to recover, notwithstanding the grant to Collins, because the defendant did not show that he claimed under the grant. But the Court refused to give the instruction as prayed for, and directed the jury that they ought to find for the defendant, although he had not connected himself with the title of Collins. There was a verdict for the defendant, and from the judgment the plaintiffs appealed.

No counsel for the plaintiffs.

Heath, for the defendants.

RUFFIN, C. J. The judgment must be affirmed. This action is founded on the possession of the plaintiff; and where he is in the actual occupation of the *locus in quo*, another person cannot justify an entry upon him, unless it be upon a better title in himself or as the servant of him who has the title; because the law will protect a peaceable possession against a mere wrongdoer. But that principle has no application to a case in which there is no actual occupation by the plaintiff, and the possession is in fact vacant; for in such a case the law adjudges the possession to be, constructively, with the title. At one time, indeed, it was doubted, whether this action would lie at all, where there was no actual possession and the *locus in quo* was in a wild state. But from the necessity of the case, it has long been held in this country, not that the action will lie without possession, but that it will lie upon that possession, which the law implies to be in the owner of land, when no other person is in point of fact

on it. Therefore in order to entitle one to maintain trespass *quare clausum fregit*, when he has no occupation of any part of the premises, he must show a title in himself, from which the law can deduce, that, constructively, he has the possession. Hence it is manifest, that in this case the plaintiff could not recover. There was no residence, enclosure, or occupation of the premises by any person, but the land was wholly unimproved, as far as we see. Then the law, which carries the possession to the title, carries it, of course, to the real title—that is, in this case, to Collins and to him exclusively; because it cannot adjudge the possession to be in different persons at the same time, merely by force of opposing claims to the title, and it must be in that person only, who has the paramount title. *Carson* v. *Burnett*, 1 Dev. & Bat. 546.

PER CURIAM. Judgment affirmed.

PRESLY HOLDER *vs.* JONATHAN JONES.

Where the plaintiff, at the commencement of a suit, has given surety for its prosecution, it is not competent afterwards for the Court, on his petition, to allow him to prosecute in *forma pauperis*, though the defendant objected to the surety and obtained a rule that further surety should be given or the suit should be dismissed.

The Court ought either to have dismissed the suit, according to the rule, or to have made an order on the plaintiff's petition, permitting him to carry on his action, without giving further security.

The Court could not discharge the first sureties from their responsibilities, without the consent of the defendant.

Appeal from the Superior Court of Law of Surry County, at the Spring Term, 1847, his Honor Judge SETTLE presiding.

The plaintiff when he commenced his action gave bond for the prosecution of the suit, as required by law. The writ was returned to Spring Term, 1846, at which time the defendant appeared, and by his attorney entered his plea and the cause was put to issue. At the succeeding term of the Court, a rule was taken upon the plaintiff, to shew cause why he should not give other and better security or justify the present. At the following term the plaintiff filed his petition, praying for leave to prosecute his suit in *forma pauperis*. Satisfactory evidence was produced, showing to the Court that the plaintiff was unable to give other security, and that he was, in the estimation of the law, a pauper. The Court made the order as prayed for.

Morehead, for the plaintiff.
Boyden, for the defendant.

Nash, J. In this order we are of opinion there is error. The Courts of justice in this State have long exercised the power of requiring other and better security from plaintiffs in cases where justice demands it, as when the sureties to the bond, already given, have removed away or have become insolvent. The Act, requiring security to be given before the writ issues, is silent on the subject; but its spirit and meaning require it, and it is in accordance with the English practice on the subject of costs. The Courts, however, in exercising this power ought and will do so, with a proper attention to the calls of justice between the parties; and will, when the plaintiff has once complied with the law in giving security, dismiss or refuse to dismiss his case, as a sound discretion may direct. When, therefore, in this case, the plaintiff failed to comply with the rule of giving better security, the Court was not bound to dismiss his action, but might, upon proper reasons shown, permit him to prosecute it without further security. The motion of the

defendant, upon the failure of the plaintiff, was to dismiss the suit. This the Court was not, we repeat, bound to do; but, in retaining the cause, was not at liberty to take from the defendant the security against accruing costs, which the bond already given afforded him. By that bond the sureties were bound, should the plaintiff fail to prosecute his suit with effect, to pay the defendant all his legal costs. It might be, and no doubt in this case was, a very insufficient protection. Still it was something. The sureties, though unable to pay any thing, might, in a variety of ways, be placed in a situation to meet its responsibilities. The defendant had a legal interest in it, of which the Court had no right without his consent to deprive him, By the order appealed from, the sureties of the plaintiff were discharged, as far as the order could have that effect, from any liability to costs hereafter incurred, and as to them the defendant was without protection. The Court ought either to have dismissed the suit according to the rule, previously obtained upon the plaintiff, or to have made an order on the plaintiff's petition, permitting him to carry on his action, without giving further security. This would be within the Equity of the Act.

The interlocutory order is erroneous and is therefore reversed. The clerk will certify this judgment to the Superior Court of Surry County.

PER CURIAM. Ordered accordingly.

DOE ON DEMISE OF JOEL SULLIVAN *vs.* SANDFORD RAGSDALE AND WIFE.

A testator devised "to my grandson J. S., son of S. S. the tract of land I now live on, with the reserve and privilege of my son S. S. the father of the said J. having the full privilege of the said land, and all the profits arising therefrom during his natural life." In a subsequent clause he says, "I further give and bequeath all my lands, that I am seized and possessed of at this time, or the profits arising therefrom to my beloved wife, during her natural life or widowhood, then for it to fall back to the said heir as above mentioned."

Held, that, even if J. S. be the *heir* intended in the second clause of the will, yet he could only take the lands, subject to the reservation in the first clause of a life estate to his father, and that he could not bring an action to recover the lands in the lifetime of the father.

Appeal from the Superior Court of Law of Guilford County, at the Spring Term, 1847, his Honor Judge MANLY, presiding.

Joel Sullivan by his last will devised as follows: "I give and bequeath to my grandson Joel Sullivan, son of Samuel Sullivan, the tract of land I now live on, supposed to be one hundred and sixty-three acres, with the reserve and privilege of my son Samuel Sullivan, the father of the said Joel, having the full privilege of said land, and all the profits arising therefrom during his natural life." By a subsequent clause, he devises as follows, "I further give and bequeath, all my lands, that I am seised and possessed of at this time, or the profits arising therefrom to my beloved wife Elizabeth during her natural life or widowhood, then for it to fall back to the said heir as above mentioned." The lessor of the plaintiff is the devisee, Joel Sullivan, the grandson, and the defendants, the heirs at law, or a portion of them, of the testator. The lessor of the plaintiff claims the premises by virtue of the second clause, as being the *heir* referred to in it. The defendants contend, that under that devise nothing passed, but the life estate of the

widow, for the reason, that the individual, who is to take after her, is so obscurely pointed out, that it is impossible to say who was meant, and the devise of course fails for uncertainty. The plaintiff offered to prove, by parol testimony, that his lessor was meant by the testator to take in remainder after his grandmother the widow. The widow is dead, and the testator left his son Samuel and several other children.

Morehead, for the plaintiff.
Mendenhall, for the defendant.

NASH, J. It is unnecessary for the Court, to decide any of the questions raised in the argument of the case. Whether the heir, mentioned in the second clause, refers to the father Samuel, or to the son Joel, or whether the devise fails altogether for uncertainty, as far as the remainder is concerned, are questions, which will be answered when a case is before us, in which they necessarily arise. In this action, they do not. If it be admitted, as the plaintiff contends, that he is the person meant by the testator, by the word "*heir*," still he cannot maintain this action. We gather from the will, that the testator owned other lands, beside that mentioned in the first recited clause, and this other land is the subject of this suit. The plaintiff, if he be one of the persons meant in the second clause, must take this land, as he does the homestead, for the words are, after the death of the widow, "then for it to fall back *to the said heir*, as above mentioned." Now under the first clause, Samuel takes a life estate in the homestead, with remainder in fee to Joel Sullivan. The latter must take the additional land devised in the second clause (if at all) in the same way as he takes the homestead under the first, a remainder in fee, after his father's life estate. We do not now decide, who is or are meant by the testator, by the word "heir;" all we decide is, that if it be the lessor of the

plaintiff, he cannot maintain this action, because the life estate of his father would precede his remainder in fee, and it has not fallen in, Samuel Sullivan being still alive, as far as appears.

Judgment is reversed and a *venire de novo* ordered which will be certified to the Superior Court of Guilford.

PER CURIAM. Ordered accordingly.

ENOS F. CUMMINS *vs.* A. G. COFFIN.

In an action against two, of three partners in a firm, the plaintiff may introduce the testimony of a third partner, not a party to the record, though he could not be compelled to give his testimony.

The evidence of a partner, in behalf of those sued as part of the firm, is not competent for them, because, in a suit for contribution, he is not only bound for his part of the debt recovered, but also for his proportion of the costs accrued in the action.

The case of *Maffitt* v. *Gaines*, 1 Ired. 158, cited and approved.

Appeal from the Superior Court of Law of Guilford County, at the Spring Term, 1847, his Honor Judge MANLY presiding.

The action is brought upon a note of hand, signed Coffin, Harvey and Co. The plaintiff proved, that the defendant was a partner of the firm, Coffin, Harvey and Co. and that the signature to the note, was that of William Coffin, another member of the firm. In order to prove the existence of the debt, and that it was contracted in the due course of parnership business, the plaintiff offered in evidence the deposition of Samuel Harvey; another member of the firm. This testimony was objected to by the defendant's counsel, but admitted

by the Court. The defendant then offered in evidence the deposition of the partner, William Coffin, and that of the said Samuel Harvey, taken at a time different from the former: both of these depositions were rejected by the Court. A verdict was returned for the plaintiff and a rule for a new trial being discharged, judgment was rendered for the plaintiff and the defendant appealed.

No counsel for the plaintiff.
Morehead, for the defendant.

NASH, J. We are at a loss to perceive, upon what ground the objection to the deposition of Samuel Harvey rests. The firm consists, as the case states, of the two Coffins, William and A. G. and the witness Harvey. The latter, though not a party to the record, could not have been compelled to give evidence; but if he chose to give it, it was certainly competent testimony on behalf of the plaintiff. The declarations of a partner, when the partnership is established *aliunde*, is clearly evidence against another partner. concerning a subject of joint interest, notwithstanding he is not a party of record. *Wood* v. *Braddick*, 1st Taunt. 104. So, also, after the dissolution of a partnership, the declaration of a partner, is evidence against his co-partners of transactions concerning the firm, and transacted while it existed, and also to repel the plea of the statute of limitations. *McIntire & Co.* v. *Oliver*, 2 Haw. 200 *Smith* v. *Ludlow*, 6 John R. 267. If the declarations of Harvey could have been competent testimony in behalf of the plaintiff, much more so is his deposition. But though his testimony is admissible in behalf of the plaintiff, it does not follow that it is competent evidence for the defendant. The general principle is, that a party to a negotiable instrument, when there are more than one, is a competent witness, either to support or defeat an action upon it, unless he be directly interested in the event or unless the verdict would be

evidence for or against him. 2 *Star. Ev.* 179. When offered as a witness for the plaintiff, he is competent, because he testifies against his interest, for if the plaintiff succeed, the defendant may have an action against him for contribution, and if he fail, he stands still open to the plaintiff's action. If offered by the defendant, he is incompetent, because he is liable to the defendant not only for contribution, but for a due portion of the costs of the first suit. *York* v. *Blott*, 5 Mau and Sel. 71. 1st Irc. 188, *Maffitt* v. *Gains*. His Honor was correct in admitting the testimony of Harvey in behalf of the plaintiff. He was also correct in rejecting the depositions of William Coffin and Samuel Harvey, when offered by the defendant. Each of these individuals was a member of the firm of Coffin, Harvey and Co. Indeed, it consisted of these two and the defendant. The witnesses were bound to A. G. Coffin, the defendant, each for his share of the costs of the suit in which they were offered as witnesses, and, to that extent at least, they were interested in the event.

PER CURIAM. Judgment affirmed.

THE STATE UPON THE RELATION OF NICHOLAS MILLER & AL. *vs.* THOMAS C. DAVIS & AL.

The bonds of constables, who are re-appointed from year to year, are not cumulative; and therefore sureties of a constable are only responsible for breaches committed during the official year for which they became his sureties, tho' at the expiration of the year, he may have been re-appointed. The cases of *Keck* v. *Coble*, 2 Dev. 491, *Governor* v. *Lee*, 4 Dev. & Bat. 457, and *State* v. *Lockey*, 3 Irc. 25, cited and approved.

Appeal from the Superior Court of Law, of Surry County, at the Spring Term, 1847, his Honor Judge CALDWELL, presiding.

In the year 1839, Thomas E. Davis, one of the defendants, was duly appointed a constable in Surry County, and entered into bond, with the other defendants as his sureties for the faithful discharge of his duties. At the expiration of that official year, he was re-appointed and gave another bond for the year 1840. In July 1839, the relator put into the hands of Davis for collection, a note, upon a man by the name of Sugart, who was at that time solvent, and so continued, up to the expiration of that official year. Davis neglected to collect the money during the year 1839, but did collect it in 1840, after his re-appointment. The action is brought on the bond of 1839, and two breaches are assigned: the 1st for not collecting; the 2nd for collecting the money and not paying over.

The defendants contended that the plaintiff was entitled only to nominal damages in this action, as the money was received in the year 1840; and the constable and his sureties for that year were alone answerable for it. The jury found a verdict against the defendants, for the full amount of the plaintiff's claim, subject to the opinion of the Court; and the presiding Judge, being of opinion that the verdict was right, gave judgment accordingly.

No counsel in this Court for the plaintiff.
Boyden, for the defendants.

NASH, J. The office of constable endures but for one year, and the bond given for the faithful discharge of his duties, binds his sureties only for acts done, or omitted to be done during that time. If, at the expiration of the official year, he is re-appointed, it is a new and distinct appointment; as much so, for the purpose of our present investigation, as if a different person were chosen. The different sureties, or the sureties on the different bonds, are answerable only for the year, to which their bond

extends, and at the expiration of each official year, the official bond given for that year, ceases to have any obligatory force, for breaches committed thereafter. Thus in *Keck* v. *Coble*, 2 Dev. R. 491; the defendant was appointed a constable for the year 1823, and in July, the relator put into his hands a note for collection, the money upon which was received by him in 1825. In an action against the constable and his sureties, upon his bond for 1823, for collecting the money and not paying over, it was held that the plaintiff could not recover. In the *Governor to the use of Leisner against Lee and others*, 4 Dev. & Bat. 457, it is decided that when a constable receives notes to collect in one year, and is re-appointed for the succeeding year, if he is guilty of *laches* in not collecting during the first year, but, still having the notes, does collect the money the second year and neglects to pay it over; in an action upon the second bond for the breach in not paying over, it is no defence to show that there was a breach of the preceding bond, each set of sureties are answerable for the breach committed for the year for which they are bound; so in *Goforth* v. *Lackey and others*, 3 Ird. 25, the Court decide, that when a constable, who continues in office two years, collects money for an individual the first year and does not pay it over, the sureties upon the first bond are liable, though the money was not demanded until the second year. These cases show, that the different bonds given by a constable are not cumulative, as in the case of guardians, but are distinct and separate, each to secure the performance of the duties stated in them. When there are more bonds than one, in order to ascertain which set of sureties is liable, it is necessary to fix the time of the breach, for that will fix the liability. Now in the case before us, in the plaintiff's declaration two breaches are assigned, one for not collecting in the year 1839, and the other for collecting and not paying over. The case states that no evidence was offered on the second; it was abandoned as the

money was received by him in 1840. For the first breach, the defendants are clearly liable, and liable in damages to the amount of injury sustained by the plaintiff. If, by the negligence of the defendant Davis, the plaintiff had lost his debt, by the insolvency of Sugart during the official year of '39, then the sureties of that year, the present defendants, would have been liable to the full amount of the claim against Sugart. But this is not the case. We are informed that Sugart, not only continued solvent, but actually paid the money due the plaintiff, to the constable Davis in the year '40, who was still an officer; and we have seen that the sureties on the official bond for the year when the money was received, are the parties liable to the plaintiff for *it*. The plaintiff is entitled against these defendants to nominal damages only. His Honor, the presiding Judge, erred in permitting the plaintiff to recover more.

PER CURIAM. Judgment reversed, and a *venire de novo* ordered.

SILAS MURRAY *vs.* EDMUND WINDLEY.

A plea, that the amount claimed by the plaintiff together with the costs then due, had been tendered to him since the commencement of the suit, is, as a plea, no bar to the plaintiff's action, though the money has been paid into Court under that plea.

The proper course, when no tender has been made before action brought, is for the defendant to move the Court that he may be permitted to pay into Court the amount he admits to be due. If the plaintiff agrees to receive this amount in full of his claim, the suit is at an end and the defendant pays the costs. If the plaintiff prefers going on to trial, and he does not recover more than the amount so admitted, he is liable for the costs incurred subsequently to the payment into Court.

The case of *Haughton and Booth* v. *Leary*, 3 Dev. and Bat. 21, cited and approved.

Appeal from the Superior Court of Law of Washington County, at the Spring Term, 1847, his Honor Judge CALDWELL presiding.

This action was commenced by warrant. The magistrate gave judgment for the plaintiff and the defendant appealed to the County Court. After this, and before the suit was returned, the defendant tendered the amount claimed, with the costs then due, to the constable, who served the process, and who was the agent of the plaintiff for the collection of the money. He declined receiving it, and at the term of the County Court, to which the papers were returned, the money was paid into the office of the Clerk. The presiding Judge ruled, that the tender of the money after the action had commenced was not good, and the payment of the money into Court could not avail the defendant, as there was no rule or order of Court authorizing it. Verdict for the plaintiff and the defendant appealed.

E. W. Jones, for the plaintiff.
Heath, for the defendant.

NASH, J. We concur with his Honor upon both points. In general all pleas relate to the bringing of the action and are answers to the plaintiff's claim, as it then exists. The plea of tender is no exception to the rule. It admits the cause of action and is a bar to its prosecution, because before its commencement the defendant had tendered to the plaintiff the money due him. This is shown by the form of the plea. In it the defendant avers "as to the said sum of $ and *before the commencement of the suit*, to-wit, on &c. at &c. aforesaid &c." If this allegation is omitted, the plea is demurrable. Where the tender has been made at the proper time with an *uncore prist*, the defendant has a right to bring the money into Court, because it constitutes a part of his plea. For the defendant must aver his readiness to pay the money admitted to be due, and that he hath paid the same into Court, or that he now brings the same into Court here ready to be paid to the said plaintiff, if he will accept

the same as the case may be. 3 *Chit. Pl.* 921. In *Haughton & Booth* v. *Leary*, 3 Dev. & Bat. 21, it was expressly decided, that a plea of tender after suit brought is, as a plea, no bar. A plea then of tender and refusal, aptly pleaded and in due time, will bar the action and throw upon the plaintiff the costs of the suit. But though the defendant may by his negligence subject himself to the payment of the costs already accrued, he may protect himself from all that may subsequently be incurred. When he only disputes the amount, to which the plaintiff is entitled, he is at liberty to move the Court for leave to pay into the office so much as he admits is due, together with all the costs, which have accrued up to the time of making the motion: upon which the Court makes the order and the amount brought in is struck from the plaintiff's declaration. If the plaintiff accepts the money, as the full amount due, the action is of course at an end; but he may deny that it is sufficient to satisfy his demands, and go on to trial. In that case if the jury find that more is due the plaintiff, than is brought in, the latter is entitled to a verdict for the over-plus, and the costs are paid by the defendant. On the contrary if they find it sufficient, the plaintiff pays all the costs incurred since the rule obtained. In no case can the defendant, after failing to make a tender at the proper time and pleading it in a proper manner, bring money into Court but upon a rule first obtained, 1*st vol. Sellon's Prac.* 305. The rule was not obtained in this case and the presiding Judge did right in giving the instruction complained of.

We perceive no error in the charge of the Court.

PER CURIAM. Judgment affirmed.

JACOB HUBBARD *v.* THOMAS L. MARSH, EX'R. &c.

If in reply, to the plea of an executor of the Act of 1789, limiting the time within which actions shall be brought against executors, &c. the plaintiff wishes to avail himself of the proviso in that Act, that he was requested by the executor not to sue, he must state the fact in a special replication.

Where it appeared that payments were indorsed on the bond declared upon, subsequently to the death of the testator, but it did not appear by whom, this afforded no evidence that the executor had requested delay.

A surviving obligor cannot continue or revive the liability of the estate of a deceased obligor by partial payments, obtaining indulgence or other means, so as to repel the operation of that Statute.

The cases of *McEntyre* v. *Oliver*, 2 Hawks 209, and *Buie* v. *Buie*, 2 Ired. 87, cited and approved.

Appeal from the Superior Court of Law of Union County, at the Fall Term, 1846, his Honor Judge Dick presiding.

This action is debt against Joel Harrell, and Marsh, executor of Thomas Watts, on a bond given to the plaintiff by David Watts and the said Joel and Thomas. The defendant, Marsh, pleaded *non est factum*, and the Act of 1789, limiting the time for bringing suits against executors; and the controversy, as between the plaintiff and that defendant, turned at the trial on the latter plea. In support of it the executor gave evidence, that he advertised according to the statute, and it appeared that the action was not brought within the limited period thereafter. The plaintiff then produced the bond, and on it there appeared credits for certain sums, entered as for payments made after the death of Thomas Watts; and thereupon, and without offering any evidence to shew by whom or at what times, in fact, those entries were made, or that the defendant Marsh had any knowledge of the bond before he was sued in this action, the plaintiff moved the Court to instruct the jury, that a presumption in law arose, that the plaintiff delayed to bring his suit at the special request of the executor; and, therefore, that the action was not barred. But the

Court refused to give that instruction: and, on the other hand, directed the jury, that, if they believed the defendant's evidence, they ought to find for him on that issue. There was a verdict and judgment for Marsh, and the plaintiff appealed.

Winston, for the plaintiff.
No counsel for the defendant.

RUFFIN, C. J. The Court is of opinion, that the judgment ought to be affirmed. In the first place, it was necessary that the plaintiff should have brought himself within the savings of the statute, by putting the matter on the record by a special replication. But, if that objection did not exist, the Court would still concur with his Honor on the construction of the statute. The second proviso of the Act is, that, if a creditor shall delay to bring suit at the special request of the executor, the debt shall not be barred during the time of the indulgence. Now, there is nothing to connect the payments or the entries of payments with the executor, so as to make them his acts personally. They may have been the acts of the other obligors or, perhaps, of the obligee himself. If so, they cannot affect the executor, nor deprive the personal estate of the testator of the protection of the Act. It is not like the case of *McEntyre* v. *Oliver*, 2 Hawks 209, and others of that class, in which it was held, that the act or acknowledgement of one partner, which takes a case out of the statute of limitations as to him, will do so likewise as to the others. There the obligation of all the parties not only arose upon the same promise, but the matter of discharge extends equally to the whole. Here, however, the discharge is one of the debtors by a special provision for his benefit peculiarly. As it was held in *Buie* v. *Buie*, 2 Ired. 87, that the discharge of an executor, under the Act of 1789, did not enure to the benefit of another obligor, so it follows, on

the other hand, that a surviving obligor cannot continue or revive the liability of the estate of a deceased obligor by partial payments, obtaining indulgence, or other means, so as to repel the operation of that statute. The operation of the Act is restricted to the estate of the deceased obligor, and the executor alone can deprive himself or the estate of its protection.

Of course, this opinion is to be understood in reference to the case before the Court, and not at all as embracing the case, where there are two executors and one of them requests delay: which may be subject to a different rule.

PER CURIAM. Judgment affirmed.

THE STATE *vs.* JAMES GHERKIN.

Falsely putting a witness' name to a bond, which is not required to have a subscribing witness, does not vitiate the bond and is not forgery.

The case of *Blackwell* v *Lane*, 4 Dev. & Bat. 113 cited and approved.

Appeal from the Superior Court of Law of Washington County, at the Spring Term 1847, his Honor Judge CALDWELL, presiding.

The prisoner was indicted for forgery. The indictment contained two counts, but on the second the Solicitor for the State entered a *nolle prosequi*.

The first count was as follows:

"WASHINGTON COUNTY, to-wit:

The jurors for the State upon their oath present, that heretofore, to-wit, on the twenty-second day of February, A. D. 1841, Sally Allen and James Gherkin signed and sealed their bond obligatory, payable to Joseph B. Griffin,

which said bond obligatory is in the words and figures following, that is to say—" $28. On or before the 1st of January, 1843, we promise to pay Joseph B. Griffin, or order twenty-eight dollars, with interest from date, it being due for value received in hand, this 28th of February, 1841.

Witness, SALLY ALLEN, (Seal.)
JAMES GHERKIN, (Seal.)"

"And the jurors aforesaid, upon their oath aforesaid, do further present, that the said James Gherkin, with force and arms in the said County, before the delivery of the said bond obligatory to the said Joseph B. Griffin, to-wit, on the day and year aforesaid, did of his own head and imagination and by false conspiracy and fraud, feloniously, knowingly, and falsely make and forge, and did wittingly, knowingly and falsely assent to the forging and making the name of one George Stubbs, as a subscribing witness to the said bond obligatory, so payable to the said Joseph B. Griffin, which said bond obligatory was afterwards, to-wit, on the day and year aforesaid, delivered to the said Joseph B. Griffin, with intent to defraud the said Joseph B. Griffin, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State."

The defendant's counsel moved to quash the bill of indictment, because the offence therein charged is not indictable. Judgment of the Court that the same be quashed. Whereupon the Solicitor appealed to the Supreme Court.

Attorney General, for the State.

Heath, for the defendant, submitted the following argument:

The enquiry, in this case, is, can a defendant be guilty of forgery, by falsely adding the name of a subscribing witness, to a *genuine* bond; an instrument, that requires no subscribing witness? Forgery is defined, by Mr. Justice *Blackstone*, 4 *Commentaries* 248, *London Edition*, 1844, to be "the fraudulent making or alteration of a written instrument, to the prejudice of another man's right," and, in *Note* 1, *Page* 247, *same Edition*, it is defined to be "a fraudulent insertion, alteration or erasure, in any material part of a true document, by which another may be defrauded." It is believed the facts of this case do not come up to either of these definitions of forgery; nor to any established definition thereof. It is

not the "false making," &c. of any "instrument" or "document;" for the Court has long since decided, *Blackwell v. Lane*, 4 Dev. & Bat. 113, that the addition of the name of a subscribing witness to a bond, does not alter or destroy the instrument, even when made by the obligee, which, it is submitted, it would do, if it were forgery. In this case, who can be "prejudiced?" who "defrauded?" Not the obligors, for they *delivered* it as a genuine instrument, and one of them is the same individual, that is charged with the forgery; not the obligee, for *it is delivered* to him, as a genuine instrument, and is valid in his hands by such delivery by the obligors, since the bond required no subscribing witness. When it is said, that the addition of a subscribing witness to a bill of sale of a slave, or a deed of gift of a slave, or the false making of a will, with two subscribing witnesses, in this Country, or three, in England, is forgery, we can understand it: it is because *these instruments are entirely inoperative without such subscribing witness, or witnesses;* but cannot we understand, how the adding of that, to an instrument, that is not required by law, that makes it neither better nor worse, neither more nor less valid, and by which no person whatever can be "prejudiced" or "defrauded," can be forgery.

A case recently occurred in Maryland, not yet reported, but which I had from the relation of Mr. *Spencer*, late Attorney General of that State, which sustains the defendant in his position. Upon the trial of a suit at law, the defendant in the suit introduced a false receipt, against the plaintiff's testator, the plaintiff having sued as executor. The body of the receipt and the signature were both in the defendant's hand-writing, and were, without doubt, imitations of the hand-writing of the plaintiff's testator: the defendant was indicted for forgery, and, on the trial for forgery, he produced a genuine receipt, from the plaintiff's testator for the same debt, that the false receipt was exhibited for: the Court held,

that the false instrument was not a forgery, because it lacked a main ingredient of forgery, viz: the capacity to "defraud:" it could not "*defraud* or *prejudice*" the right of the plaintiff's testator, or the plaintiff himself, *because the debt to which the receipt was applicable had been actually paid.* Much to the same purpose, is the case, 2d *East's P. Crown*, 953, where it was decided, that it was not forgery, in *England*, falsely to make a will *for land*, as attested by *two* witnesses, the law requiring three; for the reason, that no one could be "*deceived* or defrauded" thereby, as "no one of common understanding would give it credit." If the definitions of forgery, here given, be correct, or, the case from Maryland, or from East, be law, then it is submitted, that the defendant cannot be held liable on this indictment, and that the judgment of the Court below, must be affirmed.

DANIEL, J. A subscribing witness is not material to the due making of a bond. The putting of the name of Stubbs to the instrument, as a subscribing witness, did not vitiate the bond, after it was subsequently delivered by the obligors to the obligee. The bond could have been established (if denied by the obligors) by proof of their hand-writing. *Blackwell* v. *Lane*, 4 Dev. & Bat. 113. It was not an alteration in a material part of a true document, by which the obligee was or could be defrauded of the money mentioned in the face of the bond. We think the judgment was right.

PER CURIAM. Judgment affirmed.

THE STATE *vs.* PETER GODET.

An indictment for stealing a hog is well supported by shewing that the defendant stole a shoat.

Where an indictment alleges the property stolen to be the property of *Elizabeth Moore*, and the evidence shews it was the property of a woman called Betsey Moore, it must be left to the jury to decide whether the person so described was known by both names.

In such an indictment, the christian and surname of the party injured, if known, must be stated; and the name so stated must be either the real name or that by which he is usually known: either is sufficient.

Appeal from the Superior Court of Law of Craven County, at the Spring Term, 1847, his Honor Judge PEARSON, presiding.

The defendant was indicted for stealing "a hog." The evidence showed that the animal was a boar shoat, between five and six months old. The owner is described in the indictment as "Elizabeth Moore," and it was shown in evidence that she was called Betsey Moore. For these variances the Court was requested to direct the jury to acquit the prisoner, which was refused, and the prisoner convicted. The indictment was at common law. The prisoner appealed from the judgment on his conviction.

Attorney General, for the State.

No counsel for the defendant.

NASH, J. Two questions are presented by the case for our consideration. The indictment charges the stealing of a hog: is it sustained by the evidence? An indictment for larceny must describe the article stolen with a certainty sufficient to identify it, and this for the purpose not only of enabling the Judge to see upon its face that the article is of value; but also for the protection of the accused, to enable him to show, if subsequently called

into Court to answer for the offence, that he has already been convicted or acquitted of its commission. 4 *Bl. C.* 306. And the evidence must correspond with the description of the property laid. Great strictness has been observed by the Court in the application of this rule. When a statute enumerates several different kinds of animals, as being the subject of larceny; in an indictment on the statute, the animal alleged to be stolen must be described, and proved to be, of the particular description specified in the statute. Thus, an indictment for stealing a cow can not be supported by proof of the stealing of a heifer, *Rex* v. *Cooke*, 1 Leach 105. 2 *East. P. C.* 616, when the statute, under which the party was indicted, mentioned both cows and heifers. So also an indictment for stealing a sheep is not supported by proof of stealing a lamb, because the statute enumerates both sheep and lambs. *Rex* v. *Loom*, Russ. and Mylne, 160. These cases are under statutes taking away the benefit of clergy. But even under statutes, 2d and 3d *Ed.* 6th, against horse stealing, it has been decided that foals and fillies are not included, because the statute mentions only the grown animals. *Willand's case*, 1st Russ. and Ry. Ca. C. 494. Here the indictment is for stealing a hog and the evidence is that it was a shoat. For animals of this description swine is the original generic term. But the legislature of this State, in legislating on the subject of mismarking, use the term hog as the generic term and consider all animals of that kind as hogs irrespective of their ages. In *Rev. Stat.* ch. 17, sec. 1, it is enacted, that "all persons shall ear mark their hogs from six months old and upwards." From six months old they are designated as hogs to be marked—under that age they are still hogs, but there is no obligation to mark them. We think the description sufficiently specific, and that his Honor was correct in over-ruling the objection. The Court sees that the article alleged to be stolen is of value in the eye of the law, and, if prosecuted a second

time for stealing it, the defendant would be at liberty to show by parol testimony, as in other cases, the identity of the article.

Another objection is urged against the conviction. It appears that the owner is described in the indictment, as Elizabeth Moore; in evidence it was shewn that she was called "Betsy Moore." The Court was requested to direct an acquittal for this variance. This request was properly refused. In indictments for offences against the person or property of another, the christian and surname of the party injured, if known, must be stated, and the name so stated must be either the real name or that by which he is usually known. Either is sufficient, *Rex* v. *Norton*, 1 Russ. & Ry. 510, and it is a question of fact to be decided by the jury, whether he is known by both names. If therefore the prisoner wish to avail himself of the objection, he ought to request the Judge to instruct the jury, that if they found the fact to be, that the name, given in the indictment to the owner of the property stolen, was not his true name, or that he was not known by it, they should acquit the prisoner. Thus in this case the defendant ought to have required the Judge to charge the jury, that if the owner of the hog was not known by the name of Elizabeth Moore, or that it was not her name, they should acquit the prisoner.

This however was not the course pursued. The counsel asked for no instruction to the jury as to the fact, but that his Honor should decide the fact himself and direct an acquittal. This was properly refused. We concur with the presiding Judge on both points.

Per Curiam. Ordered to be certified accordingly.

WILLIAM COOKE *vs.* JOHN S. NORRISS.

In an action for use and occupation, where it appeared that one P. had leased the premises to the defendant for the year 1844, that in the latter part of that year he, with the knowledge and consent of the defendant, rented the same to the plaintiff for the year 1845, who leased a part of the same premises to the defendant, who occupied them and held them under the plaintiff. *Held* that, if this was a case, in which attornment was necessary, the defendant had attorned, and at all events was liable to the plaintiff for the rent.

Held, further, that the defendant having abandoned the premises before the end of the year 1845, and no specific contract being proved as to the time he should enjoy them and the premises being a wharf and ware-house in a commercial town, it was properly left to the jury to say for what time the parties intended the lease to continue, and the Court could not non-suit the plaintiff, because his action was brought before the expiration of the year.

Appeal from the Superior Court of Law of New Hanover County, at the Spring Term, 1847, his Honor Judge MANLY, presiding.

This is an action for use and occupation of a wharf in the town of Wilmington. The case is—the wharf in question together with an adjoining lot, on which was a ware-house belonged to one Parsley, who hired them to the defendant for the year 1844. The defendant was engaged in erecting a public building for the United States on a lot adjacent to the wharf and hired the premises for the convenience of carrying on his work. In the latter part of the year 1844, Parsley, with the knowledge and consent of the defendant, rented the whole of the premises to the plaintiff for the year 1845, and the defendant hired from the plaintiff a room in the ware-house, and continued his occupation of the wharf. This occupation continued until the middle of the year, when the defendant abandoned the possession and refusing to pay any rent, this action was brought. The recovery of the plaintiff was opposed upon two grounds: 1st, that the defendant had never attorned to the plaintiff; and 2nd, that the action would not lie until the end of the year. The case was left to the jury by the presiding Judge upon

all the facts, stating at the same time it was necessary, in order to find a verdict for the plaintiff, that they should find some act of attornment or some admission of the plaintiff's title. Verdict for the plaintiff, and appeal.

Strange, for the plaintiff.

No counsel for the defendant.

NASH, J. If this be a case in which the doctrine of attornment applies, the statement made by the presiding Judge shows that the defendant did attorn. The defendant was in possession of the wharf under the plaintiff. His term under Parsley had expired and he had accepted from the plaintiff a lease for the room in the ware-house.

This is simply a case of sub-letting, by which the defendant became a tenant under the plaintiff. This was an acknowledgement of his right and coupled with possession under him would amount to an attornment.

We do not think the plaintiff's second objection a sound one, applicable to this case. It is true as a general proposition that any occupation of one man's land by another, under a contract, is, in law, considered a tenancy from year to year, and this from policy and to favor agriculture. In which case, the lessor cannot support an action for the rent until the end of the year.

But it does not follow because the law favors leases from year to year, that the parties may not contract for a shorter period, and, if so, the action can be brought as soon as the time of renting expires; it depends upon the contract of the parties. Here there was no direct evidence of a specific contract, either as to time or rent, and it was a question for the jury to decide, from the circumstances of the case, what the contract was. The wharf was occupied by the defendant, not for the purposes of agriculture, but as a convenience in carrying on his work on the adjacent lot. If the jury believed that it was understood by the parties mutually that the defen-

dant was to occupy it for the whole year or for a short time, as his convenience required, then that was their contract, and if they should believe that the convenience of the defendant required its occupation the whole year, the action was prematurely brought, because he would be entitled to the possession until the end of the year. If, on the other side, the convenience of the defendant required a shorter occupation and he terminated his possession, because he had no further use for it, the term ended, and the plaintiff would be entitled to demand his rent as soon as the occupation ceased. We must suppose that the Judge gave an instruction to this effect, or that the defendant did not deem it essential that he should, as no prayer for such instruction or refusal to give it is stated in the defendant's exception. The omission of proper instruction does not constitute error, but its refusal does. *Simpson* v. *Blount*, 3 Dev. 34.

PER CURIAM. Judgment affirmed.

JOHN COCHRAN *vs.* JAMES R. WOOD.

Where a defendant on an appeal from the judgment of the County Court, gave but one surety, the surety cannot on the judgment being affirmed in the higher Court, object to a judgment against himself, on the ground that the Statute requires two sureties on an appeal from a Justice.

The sureties are required for the benefit of the plaintiff, and he may dispense with them in whole or in part, at his option.

The case of *Arrenton* v. *Jordan*, 4 Hawks. 28, cited and approved.

Appeal from the Superior Court of Law of Anson County at the Spring Term 1847, his Honor Judge BATTLE, presiding.

The plaintiff recovered a judgment in the County Court against Wood, who appealed and entered into bond with Waddell as his surety. In the Superior Court the plaintiff again recovered, and then moved for judgment against Waddell on the appeal bond; which the latter opposed on the ground, that there was but one surety, whereas the statute requires "two sufficient sureties." But the Court gave judgment for the plaintiff, and Waddell appealed to this Court.

Winston and *Strange*, for the plaintiff.
Mendenhall, for the defendant.

Ruffin, J. An appeal bond is required for the security of the Appellee; and for his better security, the statute provides that there shall be "two sureties." But as the bond is intended for the benefit of the appellee, it is entirely competent for him to renounce it, either wholly or in part. It was upon this maxim, that it was held, as far back as *Dr. Wm. Drewry's case*, cited 10 Rep. 100, in debt on a bail bond to the sheriff, that the bond was good, though given by one surety, and the statute used plural words. The same point was determined here in *Arrenton* v. *Jordan*, 4 Hawks 28. That case held further, that a *scire facias* would lie on such a bond; and thus established, that the principle extends to all remedies, as well those under the statute as those at common law. Now, the language of the 69th section of the Act of 1777, ch. 115, respecting bail bonds, is precisely the same as that of the 75th section respecting appeal bonds, each requiring the bond, "with two sufficient sureties." The reasoning and decision of *Arrenton* v. *Jordan* is therefore in point here. The terms, in which the sureties are to be bound, cannot, indeed, be substantially varied; or, if they are, the obligee cannot entitle himself to the remedy of the statute, but must get on as well as he can at common law. But an objection, founded solely on the number of

sureties, cannot impair the obligation of the bond, or impede any remedy on it; because the obligee though he might, is not bound to, insist on the provisions of the Act in his favor, being strictly observed in that respect.

PER CURIAM. Judgment affirmed.

GEORGE COON, EX'R. &c. vs. JOSEPH RICE.

A testator bequeathed to A. B. as follows: "I give and bequeath unto my daughter Elizabeth Coon, during her natural life, at the end of which to the only heirs of her body, one negro girl named Riah, this to the aforementioned to them and their heirs forever." *Held*, that as this disposition, if applied to land, would have created an estate tail, it gives the absolute property in the slave to Elizabeth Coon, there being nothing in the other parts of the will to show that the words "heirs of the body" meant "children."

Appeal from the Superior Court of Law of Davie County, at the Spring Term, 1847, his Honor Judge DICK, presiding.

This is an action of replevin to recover possession of a negro girl slave named Rachel. This girl is the child of Riah, a negro woman bequeathed in the will of Joseph Richards in the following words, viz: "I give and bequeath unto my daughter Elizabeth Coon, during her natural life, at the end of which to the only heirs of her body, one negro girl named Riah, this to the aforementioned to them and their heirs forever." The testator, Richards, died in the year 1822. About the year 1812, his daughter Elizabeth inter-married with Jacob Coon, the plaintiff's testator. At the date of Richards' will, and

at his death, there were living two children, the offspring of this marriage, and also several children of said Elizabeth, the offspring of a previous marriage, one of whom is the defendant. There was an assent to the legacy to Elizabeth Coon. The testator of the plaintiff died in 1844, and his wife Elizabeth since, but before the commencement of this suit. The girl Rachel was born after the death of Joseph Richards. Upon the death of the plaintiff's testator, the plaintiff took possession of the girl Rachel, and hired her out, and Elizabeth Coon became the hirer, and at the expiration of the term of hire, she placed her in the possession of the defendant, where she remained until the death of Elizabeth, and until the commencement of this suit. A verdict was taken by agreement for the plaintiff, subject to the opinion of the Court on the nature and extent of the estate in the woman Riah, given to Elizabeth Coon, by the will of Joseph Richards—the plaintiff contending that it is an estate absolute and without remainder, and therefore that she and her child Rachel belong to the estate of his testator: the defendant contending, that by the will no greater estate than for her life-time is given to Elizabeth Coon in said slaves, and that a remainder thereof vested in her children, one of whom is a defendant, and so that, as against the plaintiff, his taking and detention were lawful.

The Court being of opinion with the defendant, as to the construction of the will, judgment of non-suit was entered, from which judgment the plaintiff appealed to the Supreme Court.

Dodge, for the plaintiff.
No counsel for the defendant.

Daniel, J. If the property had been land, and Joseph Richards had devised it to his daughter Elizabeth Coon for life, "at the end of which, to the only heirs of her

body, this to the aforementioned, to them and their heirs," it would in law have been an immediate estate tail, vested in Elizabeth Coon. In looking over the whole will, there is not a word in it, to indicate that the testator intended "*children*," when he used the words, "heirs of the body of Elizabeth Coon." These words, must therefore, have their legal effect, and in as much as they would have created an estate tail in Mrs. Coon, if the subject matter had been land, they in law create in her an absolute estate in Riah, she, Riah, being personal property. The two cases cited by the plaintiff's counsel, are we think in point for him.

The judgment of nonsuit must be set aside, and a new trial granted.

PER CURIAM. Ordered accordingly.

SUSANNAH J. E AMIS & AL. *vs.* LEWIS AMIS, EX'R. & AL.

The act of 1829 (*Rev. Stat. ch.* 85, *sec.* 18,) for the partition of slaves or other personal chattels applies only to a plain legal tenancy in common, and not at all to a suit against an executor for negroes, as parts of a legacy to two or more persons in common.

In this latter case the rights of the claimants cannot be ascertained, until the administration has been closed, or all the accounts have been taken; and the executor is proceeded against in his character of a trustee for the legatees.

The Court will not entertain suits for the separate parcels, which constitute the mass or residue of an estate; but, in order to avoid an unnecessary multitude of suits, requires that the suit should be so brought, as to take all the accounts and distribute the whole estate by the decrees that may be made therein.

Appeal from the Superior Court of Law of Granville County, at the Spring Term, 1847, his Honor Judge MANLY presiding.

Joseph Amis by his will, dated July 20th, 1840, directed all his estate to be kept together under the control of his executors, and gave them discretionary power to sell any part of his real or personal property, as they might think most advantageous for his wife and children. There are then these clauses in the will. "I direct that my children remain with my wife, to be raised and educated out of my estate, and, as one may become of age or marry, to have allotted to such child as much of my estate as I have given my daughter Betsey and put her in possession of. If my wife should die my widow, I direct at her death, that my estate of every description be equally divided between all my children, considering in the distribution the part which each child may have received at marriage or full age; and if my wife should marry, in that event I direct that all my property be divided between her and all my children, at the same time taking into consideration what has been given off to such as have become of age or married. In educating my children, I direct that my son Lewis be continued at College until he graduates; and, should the income of my estate justify, I wish my other two sons James and Joseph to receive a like education; otherwise, the best education the income of my estate will afford. I wish all my daughters to receive a good English education; and, should the income of my estate fall short of giving them a good practical English education, I wish them to receive one, even at the expense of the capital of my estate." The testator appointed his wife executrix, and his son Lewis and his son-in-law Lewis Amis, then the husband of the daughter Betsey, the executors of the will. At the death of the testator in August 1840, he left seven children surviving him; namely, the married daughter Betsey, Ann S., Lewis, Mary, Jane, James and Judy. After qualifying as an executor, Lewis Amis, the son-in-law, died, and also his wife Betsy; but which died first, does not appear. They left three infant children, who together with the testator's daughter Ann S. Amis, are the plaintiffs in this suit;

which was instituted in November 1846, by petition in the Court of law against Lewis Amis, the son, as surviving executor of the will, and the other children of the testator. It states that the testator's widow had then recently died, and that thereby the period for dividing the estate had arrived: That the advancement to the daughter Betsey was of the value of $1300; and that the daughters Mary and Ann S., and the son Lewis had upon coming of age received advancements to that value respectively; and that the daughters Jane and Judy F., and the said James Amis, were each entitled then to receive property to an equal value, and then that the residue of the estate was divisible equally amongst the children of the testator or their representatives; and that in such division the three infant plaintiffs, who are the children of Betsey Amis, represent their deceased mother and are entitled to her share: That the estate of the testator consisted, amongst other things, of twenty-seven slaves, who are named; and that the parties plaintiffs, and defendants, are entitled to them as tenants in common, in the several shares before stated: And the prayer is, that the said negroes may be divided accordingly, and the shares of the several claimants allotted in severalty.

The answers admit the allegations of the petition. But they state that the two defendants, James A. and Judy F. are still infants and that their educations have not been completed, and insist that the expense thereof should be defrayed out of the income of the whole estate before any division, or that a sufficiency for that purpose should be set apart and retained by the executor. The executor also states, that, after deducting his disbursements hitherto and certain other debts of the testator, there remains in his hands in cash and good debts the sum of $1178; which he says is not sufficient to discharge his commissions, and an annuity of $50, which the testator granted to one Downey for life, and to defray the expenses of attending to certain claims on persons residing in Mississippi and

Texas: And he insists on being allowed to retain out of the negroes as many as will form an adequate fund for those purposes.

Upon the hearing, the Court declared amongst other things, that, according to the proper construction of the will, the expenses of the education of the infant defendants, James A. and Judy F. were in the first instance to be defrayed out of the income of the testator's estate, but that those persons were, nevertheless, in the event that had happened, to be charged therewith as parts of their shares in the division of the estate: And declared farther, that the executor ought to retain as much of the estate, including a part of the negroes, if necessary, as would meet those expenses, and would discharge from time to time the annuity to Downey and cover all proper expenses attending the collection of the claims in the South, and completing the administration of the estate; and, subject thereto, that the residue of the slaves ought to be divided, as claimed in the petition, allotting one share of them to the plaintiffs, who are the children of Mrs. Betsey Amis, deceased, as representing their mother. The decree then referred it to the Master to enquire into the value of the advancement to the daughter Betsey, and of those made to any others of the testator's children, since his death, upon their coming of age or marrying, and to enquire also what part of the estate it would be proper the executor should retain for the purposes aforesaid; and then directed the Master, after setting apart a proper fund therefor, to allot to each of the children, who had not been advanced, a portion of the negroes equal in value to that of the advancement by the testator to his daughter Betsey, and then to divide all the residue of the slaves equally between the parties, according to their rights as before declared: and all further directions were reserved until the coming in of the report. From that decree an appeal was allowed to the defendants.

Lanier, for the plaintiffs.

Badger, *E. G. Reade*, and *Gilliam*, for the defendants.

RUFFIN, C. J. The proceedings in this case do not authorise the Court to decide the questions, raised and decided in the Superior Court. The petition seems to have been drawn upon the idea, that it would lie under the act of 1829 for the partition of slaves or other personal chattels; and the decree, we suppose, proceeded upon the same notion. But that act applies only to a plain legal tenancy in common, and not at all to a suit against an executor for negroes, as parts of a legacy to two or more persons in common. In this latter case the rights of the claimants cannot be ascertained until the administration has been closed, or all the accounts have been taken; and the executor is proceeded against in his character of a trustee for the legatees. The very decree in this case shews, that it was impossible to treat the parties, as tenants in common merely; for it became necessary to direct enquiries into the entire estate and as to advancements to the children respectively, before either of the parties could claim any thing.

But if this could be looked at as a petition in the Courts of law for legacies and portions, as given by the Statute, instead of the suit in the Court of Equity, the plaintiffs cannot be relieved on it, because the sole prayer and object of the plaintiffs' is for an account of the slaves, belonging to the testator's estate, and for a division of them. The slaves are not given specifically, or separately from the other parts of the estate; but the children become entitled to them under the general gift of the testator's "estate of every description, to be equally divided among his children" at the death of his widow. Now, the Court does not entertain suits for the separate parcels, which constitutes the mass or residue of the estate; but, in order to avoid, an unnecessary multitude of suits, requires that the suit shall be so brought, as to take all the

accounts and distribute the whole estate by the decrees, that may be made therein.

Besides, there is another objection to the parties. The administrator of the testator's daughter Betsey is not before the Court, and her infant children are improperly made parties, as representing her. The act of 1816, *Rev. Stat. ch.* 122, *sec.* 15, has no application here. That vests the estate, given by the will of a parent to a child, who dies in the life time of the parent, in the issue of such child so dying. But here the daughter Betsey survived her father, and the legacy rested in her, and survived to her administrator or executor, and not to her children. Indeed it may be that her husband survived her, in which case her administrator would hold in trust for the husband's representative, and not for the wife's children.

For all these reasons it was erroneous to pronounce the interlocutory decree given in the Superior Court, and this opinion will be certified to that Court, that the decree may be reversed, and other proceedings had in the cause according to right and justice.

The plaintiffs must pay the costs in this Court.

PER CURIAM. Ordered to be certified accordingly.

THE STATE *vs.* DAVID VALENTINE.

The deposition of a witness, taken in a criminal case before the examining magistrate, under the act of 1715, *Rev. Stat. ch.* 35, *sec.* 1, may be read in evidence on the trial of the prisoner, if the witness is then dead.

In such a case the deposition may be used either in chief, by either party, if the witness is dead, or upon the cross-examination of the witness in Court.

The proof of the deposition is usually, but not necessarily, by the magistrate or his clerk; but, in this State at least, there being no statutory direction as to the mode of proof, the probate must be a matter of sound discretion in the presiding Judge, keeping in view the general principles of evidence, alike necessary to the safety of the accused and the due administration of the law.

Held, in this case that, it appearing that the examining magistrate was necessarily absent in the discharge of high public duties, proof by the Clerk of the Superior Court, to which the deposition had been returned according to law—that he was present when the deposition was taken—that the examination was written down by the magistrate himself, and that the deposition, returned to his office and offered in evidence, was in the proper hand-writing of that magistrate—was sufficient to authorize the reading of the deposition.

A witness is not rendered incompetent by the commission of, or by the conviction for any crime, but only by a judgment upon such conviction.

Appeal from the Superior Court of Law of Guilford County, at the Spring Term, 1847, his Honor Judge MANLY presiding.

The prisoner is indicted for murder. On the trial, the deposition of one Jacob Cotton, an accomplice, was offered in evidence by the prosecuting officer on behalf of the State, and objected to by the prisoner's counsel. It was taken by his Honor Judge PEARSON, under the Act of 1712, *Rev. Stat.* c. 35, s. 1, and in the presence of the prisoner. Its reception in evidence, was opposed, "for the reason that it did not appear, that it was the one taken down by Judge PEARSON at the time; that it did not appear when it was written; that the witness, Cotton, had been found guilty of murder, by the verdict of a jury; that the deposition was taken between the verdict and the judgment; that the judgment was rendered on

the verdict, at the same term, and the witness shortly thereafter executed." The deposition was admitted upon such proof as the Court thought sufficient. The prisoner was convicted and from the judgment on such conviction, appealed to the Supreme Court.

Attorney General, for the State.
No counsel in this Court for the prisoner.

NASH, J. The first branch of the objection is as to the proof of the deposition. There is no direct provision in the Act or in the Statute of Philip and Mary, authorising any use of the evidence when taken, or pointing out the mode, how it is to be authenticated. Under the Statute it has been the constant practice in the English Courts, to permit the deposition to be read in evidence, after the death of the witness; and such has been the uniform practice in this State, and, indeed, both acts evidently look to such a use of it. For they require that the deposition taken according to their provision, "shall be returned to the office of the Court, wherein the matter is to be tried." To what purpose but to perpetuate them, and why perpetuate, but to provide for the contingency of the death of the witness, or to serve as a check upon him, if called into Court as a witness thereafter. The depositions taken under the act, are legal evidence, to be used either in chief, by either party, should the witness die, or upon the cross-examination of the witness in Court, *Westbeers' case*, 1st Leach 12, *Smith's case* Russ. & Ry. 339. In order however to its being used as evidence, it is usual, according to the English practice, to prove it, either by the magistrate or his clerk, if living. It is to be remarked, this is but a matter of practice, and not a Statutory provision, adopted by the Courts as being the best mode of its authentication. Our magistrates have no other clerks, but the individual whose pen they may use, in writing down the deposition. And it is a matter

of public law, that at the time the prisoner had his trial, Judge Pearson was necessarily in another part of the State in discharge of his judicial duties. It could not then be proved in either of those modes, as his Honor wrote it himself. The probate, then, in this State must be a matter of sound discretion in the presiding Judge, keeping in view the general principles of evidence, alike necessary to the safety of the accused and the due administration of the law. In order to remove the objection raised, and to identify the deposition, the Clerk of the Superior Court of Rowan "where the matter was to be tried," was examined, who stated "he was present when his Honor Judge Pearson examined the witness, Cotton; that he wrote down the evidence as he examined him, and that the deposition and certificate were all in the proper hand-writing of Judge Pearson, who afterwards delivered them to him, to file in his office." We think, this evidence amply sufficient to prove, and to identify the deposition.

But a further objection is raised to-wit, that at the time Cotton was examined, he had been rendered incompetent as a witness, by his previous conviction for murder, the deposition having been taken between the conviction and the judgment. This is the only important question raised in the case. Infamy of character does not render any one incompetent, as a witness, nor does the commission of any crime, however atrocious, tho' acknowledged, 8 *East.* 97, 8. His guilt, to work that effect, must be legally ascertained by a conviction and that followed by a judgment. The objection is a strictly legal one, and must be supported by strictly legal proof. This can only be done by the record, and that must show, both a conviction and judgment; otherwise it is incomplete, not a *full* record of the case. The judgment may have been arrested, and the conviction thereby rendered a nullity, as if it never had an existence, 8*th East.* 77, 8 *Comp.* 8 *Comy. Dig. Title Testimony, A.* 5. It is not the conviction then, but the judgment, which creates the disability. 2 *Russ. on*

C. 597. *Hawk. P. C. ch.* 36, *sec.* 94, 95. 1*st. Phil. on evi.* 31.

We are of opinion that there is no error in the opinion of the Judge who tried the cause. The deposition of the witness Cotton, was properly taken, and legally proved and identified, and at the time it was taken, the witness was competent to give evidence.

This opinion must be certified to the Superior Court of Guilford, that the Court may proceed to judgment and award execution according to law.

PER CURIAM. Ordered accordingly.

THE STATE *vs.* WILLIAM MOORE.

A special verdict is in itself a verdict of guilty, as the facts found in it do or do not constitute in law the offence charged. There is nothing to do on it but to enter a judgment thereon for or against the accused, unless the Court should deem the verdict, as found, not to be sustained by the evidence, when they may set it aside and order a *venire de novo*.

A judgment on a special verdict leaves the matter of law distinctly open to review in a higher Court.

But when the Court sets aside a special verdict, as they may do, they cannot of themselves enter a general verdict of guilty or not guilty. That must be done by a new jury.

If done by the Court, it is a mistrial.

The case of *Miller*, 1 Dev. and Bat. 500, cited and approved.

Appeal from the Superior Court of Law of Beaufort County, at the Spring Term, 1847, his Honor Judge PEARSON, presiding.

The prisoner was indicted for stealing two barrels of turpentine, the property of Frederick Grist. The record

states his plea of not guilty, and his trial by a jury who found him not guilty, and judgment given thereon for him; and then sets forth an appeal therefrom by the Solicitor for the State. In an exception annexed to the record, however, it is stated, that the jury found a special verdict to the effect, that Grist owned a tract of land on which certain pine trees were boxed, and worked for turpentine by him in the year 1846, until the month of May, and that he then discontinued the working for that season: and that in August of that year, the prisoner secretly, during two days, dipped out of the boxes which had been made by Grist, as much in quantity as two barrels of turpentine, which had run after Grist had discontinued the cultivation in May, and the prisoner put the same into two barrels, which he had provided and kept concealed in the woods, and then he carried it away secretly and sold it. And upon the facts thus found, the jury prayed the advice of the Court, whether the said turpentine was the subject of larceny, and, if so, whether the allegation, that the prisoner stole "two barrels of turpentine," was thereby sustained; and if the Court should be of opinion in the affirmative upon both of those questions, then the jury found the prisoner guilty in manner and form as charged in the indictment; but if the Court should be of a contrary opinion, upon either of the said questions, then the jury found the prisoner not guilty. The exception further states, that the Court was afterwards of opinion with the prisoner upon the matters thus referred to it, and thereupon entered the verdict, "not guilty," and gave judgment for the prisoner thereon; and then the Solicitor appealed.

Attorney General, for the State.
No counsel for the defendant.

RUFFIN, C. J. It may have been the purpose of the appeal to get the opinion of the Court, upon the questions

raised in the special verdict, which the exception states to have been given. But they are not open in the State, in which the case is brought up. A special verdict is in itself a verdict of guilty or not guilty, as the facts found in it do or do not constitute in law the offence charged. There is nothing to do on it, but to write a judgment thereon for, or against the accused: that is, upon the supposition, that the Court deems the verdict, as found, to be sustained by the evidence. A judgment on it leaves the matter of law distinctly open to review in a higher Court. It is for this reason, principally, that special verdicts are given in criminal cases; so that the State, as well as the prisoner, can have the matter of law solemnly decided. But in this case, instead of proceeding to judgment on the verdict given by the jury, the Superior Court set that aside, and entered a general verdict of not guilty. That presents the case, in a condition entirely different from what it before was, and precludes this Court from dealing with the questions of law presented in the special verdict. For the Superior Court had the discretion, at the instance of the prisoner, to set aside that verdict, and there is no power here to re-instate it. But when it was set aside, the power of the Superior Court ended, and the entering further of a general verdict of not guilty, was without authority of law. A judgment for the prisoner on such a general verdict is essentially different from one in his favor on the special verdict. The latter involves matter of law only, and is therefore the subject of a writ of error or appeal. But a general verdict of acquittal, as it includes both fact and law, is conclusive against the State, however erroneously the jury may have been instructed or may have found in point of law. The security of the citizen demands this immunity from being questioned after a full acquittal by a jury, whether right or wrong. But that can only be true of a verdict really given. The verdict in this case, however, which now appears in the record, was not given

by the jury and is therefore null. It is essentially different from that which was given, and was therefore improperly entered. It is true, that it is to be presumed, that the verdict was given as entered; and that presumption would be conclusive against any evidence but the record of the special matter, made by the Judge, before whom the verdict was given. But here we have the authority of the Judge himself in the exception, that the jury gave one verdict, which he set aside, and that he then entered a different one. It is the same, as if the verdict had been, when there was no jury, or as if a general verdict of guilty had been turned into one of not guilty. As this all appears in the exception, this Court is bound to act on it, and to order a *venire de novo*, because there never has been legally a trial, but only a mis-trial. 2 *Hale, P. C.* 306. *Miller's case*, 1 *Dev. & Bat.* 500.

PER CURIAM. *Venire de novo* awarded.

THE STATE ON THE RELATION OF K. GARRETT, ex. ASA JOHNSON & AL.

In the administration of assets, judgments by Justices of the Peace are to be paid before bonds and notes. But as they are not matters of record, of which the executor or administrator is bound to take notice, actual notice of them must be given by the creditor.

The dormancy of a judgment does not at all affect its dignity in the administration of assets.

Appeal from the Superior Court of Law of Washington County, at the Spring Term 1847, his Honor Judge CALDWELL, presiding.

This is an action of debt on an administrator's bond by a creditor of the intestate, suggesting a *devastavit*. The relator obtained a judgment before a Justice of the Peace against the intestate, Abram Chesson, in his life time, and gave notice of it to Thomas W. Chesson, the administrator of Abram, and demanded payment from him. At that time and at the death of the intestate, the judgment was dormant. The administrator then had assets sufficient to discharge the judgment, but he afterwards applied them to the payment of bond debts of the intestate. The only question at the trial, on the issue of conditions performed, was, whether the judgment ought to have been paid before the bonds or not. His Honor held, that the judgment was entitled to the preference; and from a judgment against them, the defendants appealed.

Heath, for the plaintiff.
No counsel for the defendant.

RUFFIN, C. J. We are not aware, that the point in this case has been directly before the Court before. But we believe, that it has been understood by the whole profession hitherto, that Justices' judgments were to be paid before notes and bonds. The members of the Court have always so considered; and upon enquiry of the Bar, we are informed that there has been no impression to the contrary, as far as the gentlemen attending this Court are informed. It is true, that they cannot be allowed the dignity of debts of record, of which an executor must take notice at his peril; because the executor cannot know, where to go in search of them. Therefore it is necessary that the creditor should give notice of them. But when notice of a Justice's judgment is given, its priority arises over specialities; because the one debt has been judicially ascertained, according to the law of the country, and the other rests entirely *in pais*. There is every reason for preferring it before specialities, that there is

for the preference given to a debt of record, except that the latter is in such a state as to be in itself notice of its existence to the executor. Both creditors have been diligent in prosecuting their demands to judgment, before the only tribunals having jurisdiction, and therefore each is entitled to the like favour; and each debt is established beyond controversy. Then, by giving actual notice, the creditor by a judgment out of Court supplies all that is wanting to put his demand on the footing of a judgment in Court, as respects its relative dignity with that of bonds. It is true, that a Justice's judgment does not absolutely prove itself, but to some purposes requires evidence that it is genuine. Yet to others it may be acted on without such evidence, as when one Justice issues an execution on a judgment given by another.

The dormancy of a judgment does not at all affect its dignity, in the administration of assets; for, in every case, no proceedings can be taken on a judgment, until the executor has been made a party by *scire facias*, or a judgment has been taken on it in an action against the executor.

Upon the whole, the Court concurs fully with his Honor, and affirms the judgment.

PER CURIAM. Judgment affirmed.

STATE vs. ANTHONY, A SLAVE.

On the trial of an indictment against a slave for a capital offence, it is good cause of challenge on the part of the State to one called as a juror, that he is nearly related to the owner of the slave, as it would be on the part of the prisoner that a juror was a near relative of the prosecutor.

An indictment for high-way robbery may charge either that the robbery was committed *in* the high-way or that it was committed *near* the high-way.

Appeal from the Superior Court of Law of Northampton County, at the Spring Term, 1847, his Honor Judge BAILEY presiding.

The prisoner is a slave of Kinchen Powell, and was indicted with a free woman, for robbing Joseph Britt, in the public high-way, of one dollar and other things. When forming a jury for the separate trial of the prisoner, three of the persons drawn and tendered were challenged by the Attorney General, because they were related to the owner of the prisoner; and, that appearing, the challenges were allowed, notwithstanding an objection by the prisoner's counsel. Afterwards a jury was formed before the prisoner exhausted his number of peremptory challenges, and he was convicted. His counsel moved for a *venire de novo*, for error in allowing those challenges, which was refused. He then moved in arrest of judgment, because the indictment did not conclude *contra formam statuti*, which was also refused; and then sentence of death was passed, and he appealed to this Court.

Attorney General, for the State.
Bragg, for the defendant.

RUFFIN, C. J. The Court is opinion, that the challenges were properly allowed. It is true, the statutes which give slaves the trial by jury in capital cases, do not specify the qualifications of the jurors, farther than that

they shall be owners of slaves; but only require that they shall be good and lawful men, and prescribe that the trial shall be conducted under the same rules, regulations and restrictions, as trials of free-men for a like offence. *Rev. Stat.* c. 111, s. 43, 45, 46. Yet the latter provisions are sufficiently comprehensive to entitle the slave to all those privileges, which are intended to secure to an accused person a jury, indifferent between him and the State. It is clear the prosecutor, or one nearly related to him, would not be a good juror, if challenged for that cause by the prisoner. The application of the *principle*, on which that rule stands, and on which the common law proceeds in forming juries in all cases, necessarily excludes the owner of the slave, or his son, and, by consequence, any other relation from sitting on the trial. The concern in interest or feeling of those persons in the result is inconsistent with that indifferency, which the law seeks. If this slave were the subject of a civil action between his owner and another, neither of those persons could have been of the jury, on the score of their favor for their kinsman. The same state of feeling prevents them from being held impartial on this trial. They are not "good and lawful men," in the sense of the statute. This is clear from the second proviso in the Act of 1793, c. 381, s. 7, being the first that gave the trial by jury to slaves in the County Court, which required, that the three justices and jury of slave-holders, who constituted the called Court, should "not be connected with the owner of such slave, or the prosecutor, either by affinity or consanguinity."

The counsel for the prisoner in this Court abandoned the objection taken in the Superior Court in arrest of judgment, that the indictment concluded at common law; and very properly, as the statute did not create the offence, but only ousted clergy. But he took another, namely, that the indictment was bad, because it did not pursue the words of the Act and lay the robbery to have

been "in or near" the highway. It appears that it was once usual to frame indictments in that way at *Newgate*, as Lord HALE informs us. 1 *Hale P. C.* 535. But he certainly does not deem it necessary, nor, as is plain, strictly proper; for he admits it violates the rule, which requires certainty in indictments and rather apologizes for it, as tolerated upon usage. The passage in which he cites a case from *Trin.* 38, *Hen.* 8, of an indictment of robbery in *quadam via regia pedestri*, being held bad, which was urged on us as an authority, that it should have been *in vel prope*, does not turn upon the omission of the words, "*vel prope*," but that of *altam*, because, as he says, "it is not sufficient to say only *via regia*, or *via regia pedestri*, since the statute is touching a robbery on the King's *Highway*. Moreover, there are many precedents of indictments not in the disjunctive, but laying the offence positively *in* the highway, and others laying it *near* the highway. *The King* v. *Stone*, 1 Tremaine 288, is an instance of the former, and that precedent is adopted by *Dogherty*, Cr. Cir. Com. 682; while *Fowler's case*, which is stated by Mr. *East*, *Pl. C.* 785, is an instance of the latter. The more recent precedents in *England* do not aid us, as it not necessary now to state any place, because the statute 3 W. and M. took away clergy from all robberies. But the older ones, and the reason of the thing, make it plain, that an indictment, if good when it is *in vel prope altam viam*, is certainly so when it is in one count, *in* the highway, and in another *near* it.

PER CURIAM. Ordered to be certified accordingly.

DEN EX DEMISE OF WILLIAM WYNNE *vs.* NATHAN ALEXANDER.

When nothing but course and distance is called for in a deed, parol evidence is not admissible, to shew that a line of marked trees not called for in the deed is the true boundary.

When one corner is established and the course and distance only given, and the next corner called for in the deed is also established, the line must run directly from the one corner to the other, although there may be a line of marked trees between the corners, but varying in some places from the direct line.

Nor is it sufficient to make an exception to this rule, that the trees were marked as the line by the parties, at the time when the deed was executed from one to the other.

The case of *Hough* v. *Horn*, 4 Dev. & Bat. 228, cited and approved.

Appeal from the Superior Court of Law, of Tyrrell County, at the Spring Term, 1847, his Honor Judge CALDWELL presiding.

The facts, upon which the points of law in this case arose, are stated in the opinion of the Court.

Heath, for the plaintiff.

No counsel for the defendant.

DANIEL, J. Tarkington (under whom both parties claimed) conveyed to Armstrong; and described the land in the deed by calling for course and distance. There is no line of marked trees called for in the deed with the course and distance. The Court permitted parol evidence to be offered by the defendant, to prove that a marked line of trees, not called for or mentioned in the deed, was the true boundary of the land conveyed, although varying from the written calls of course and distance, (the only calls mentioned in the deed.) This was not correct. Course and distance mentioned in deeds must be observed, except when natural boundaries are called for and shown, or where marked lines and corners can be proved, which were made at the original survey for

a grant, *Bradford* v. *Hill*, 1 Hay. 22. The Court charged the jury, that if the marked line insisted on by the defendant was marked by the parties at the execution of the deed from Tarkington to Armstrong, as the boundary of the land conveyed, the parties were bound by it, notwithstanding the variance from the course called for in the deed. We do not concur in this charge. The pine stump at the beginning of the line was ascertained; and so was the beech stump, at the termination of the said line. The call in the deed, was for a line, S. 55, E. 114 poles to the beech. In *Hough* v. *Horn*, 4 Dev. & Bat. 228, this Court said, where a grant called for a certain course, from one corner to another, without saying by a line of marked trees, and the corners are both established, the direct line from the one corner to the other is the boundary, although there may be a line of marked trees between the corners, but varying in some places from the direct line. This being the law, the charge of his Honor was wrong, and there must be a new trial. The old cases of *Bradford* v. *Hill* and *Perrón* v. *Roundtree*, and others of that kind, went much on the material circumstances, that the surveying and the returns of it and the plat sent to the Secretary's office, and the filling up of the grant, were the acts of public officers, whose mistakes it was hard to allow to prejudice the rights of the party; and, especially as the law requires the plat and description of the land to be annexed to the grant, and so they could be referred to in aid of the construction.

PER CURIAM. New trial awarded.

THE STATE *vs.* JOHN COWAN.

It is sufficient to admit a witness to prove a conversation of the defendant, when he says he can state all that passed on the occasion, when that conversation occurred, whether relative to that controversy or any other subject. It is not necessary for him to be able to state all the conversations of the defendant, which he heard before or after the conversation offered to be given in evidence.

A defendant, in his exception, must shew some error to his prejudice; otherwise this Court will not set aside the verdict of the jury.

When a magistrate, on the examination of a prisoner, accused of robbing an individual of a watch on the previous night and on whom the watch was found, told him "that unless he could account for the manner, in which he become possessed of the watch, he should be obliged to commit him, to be tried for stealing it," this did not amount to such a threat or influence as would prevent the introduction of the subsequent confession of the accused, especially as the magistrate repeatedly warned him not to commit himself by any confession.

A prisoner may be convicted, upon his own voluntary and unbiassed confession, without any other evidence.

If an indictment for robbing, under the Statute, charges that the robbery was *in* the highway, the State cannot give in evidence that it was *near* the highway.

A wharf, simply as such and not being part of a street, is not a public highway.

An indictment for highway robbery, which charges that the property was taken from the person and against the will of the owner, feloniously and violently, is sufficient.

Appeal from the Superior Court of Law of New Hanover County, at the Spring Term, 1847, his Honor Judge BATTLE, presiding.

The defendant was indicted for high-way robbery. On the trial, a witness, named Hall, was introduced to prove a conversation, which he heard between Cowan and Price, who were confined in jail for the same offence. The prisoners were in different cells, but could converse through a sink, which passed under both cells. The witness was asked if he could state all the conversation which passed between the prisoners, to which he replied that he could not, that he could only state what had been

said by one to the other on a particular occasion. This was objected to by the prisoner's counsel, but admitted by the Court.

The principal testimony relied upon by the Solicitor for the State, for the conviction of the prisoner, was his own confession. As to that, Mr. James T. Miller testified, that he was one of the Magistrates, before whom the prisoner was examined previous to his commitment for trial: that after he had closed the examination, Mr. G. W. Davis, the British Vice Counsel, who was present, asked of the prisoner one question, what, the witness did not recollect, but it was one, which he supposed might induce the prisoner to say something prejudicial to his cause, and he immediately cautioned him against making any confession, telling him, that he was not bound to do so, and that if he did make any confession, it might be used against him.

Mr. G. W. Davis testified, that he did not recollect asking any question of the prisoner, and he thought Mr. Miller was mistaken in thinking that he did so. He stated that after the watch, which it was alleged had been taken from Captain Rodney the night before, was proved to have been in the possession of the prisoner, Mr. Miller told him, that unless he could account for the manner in which he became possessed of it, he should be obliged to commit him to jail to stand his trial for stealing it: that the prisoner stated that he was anxious to sleep on board a vessel, which was about to sail, and then commenced stating how he got the watch, when he was cautioned by Mr. Miller not to make any confession, as it might be used against him, but he declared that he would tell all about it. Under these circumstances the prisoner's counsel contended, that his confession was inadmissible, because it was not free and voluntary, but obtained either by the question put to him by Mr. Davis, who it was alleged had an influence over the prisoner, who was a sailor, on account of his, Mr. Davis' official

station, or by the remarks of Mr. Miller, the Magistrate, that, if he did not account for the manner in which he got the watch, he must be committed to jail.

The Court deemed the confession admissible; whereupon the witnesses stated that the prisoner confessed, that he had knocked Captain Rodney down and taken his watch from him, and that the watch then produced, which Captain Rodney claimed as his, was the one which he took. Mr. Miller stated that his impression was, that the prisoner stated that this took place in the street, but he was not entirely certain, but that it was on the wharf. Mr. Davis stated that he understood the prisoner to say, that Captain Rodney was near a gate, when he knocked him down, and that, in taking his watch, he broke the guard and buried it in the street, near the body of Captain Rodney. It was proved and not disputed, that Captain Rodney was badly wounded on that night, having received several severe cuts and bruises on his head and face. It was also proved, that the wharf, near where the robbery was alleged to have been committed, was used by the public, and was not in any manner enclosed, though some wharves below there were private property. The witnesses, Miller and Davis, stated, before testifying as to the prisoner's confession, that they believed they could give the substance of all that the prisoner confessed.

The Court in the charge to the jury, after calling their attention to an alleged discrepancy in the testimony of the witnesses Miller, and Davis, with remarks thereon, told them that the prisoner's confession alone, if believed by them to be true, would justify them in returning a verdict of guilty, and much more would they be justified in rendering such a verdict, if they found the confessions or any material part of them corroborated by other testimony; and that whether the offence was committed in the street or on the wharf, it was highway robbery.

The prisoner was convicted, and his counsel moved for a new trial.

1st. Because of the admission of the testimony of Hall.

2nd. Because of the admission of the confessions of the prisoner.

3rd. Because the Court charged that the confessions alone would, if believed, justify a conviction, it being contended that the *corpus dèliciti* ought to be proved by testimony, independent of the confessions.

4th. Because the Court charged that the wharf was a highway.

The Court overruled the motion and pronounced sentence of death, from which the prisoner appealed to the Supreme Court.

Attorney General, for the State.

Strange, for the defendant.

Ruffin, C. J. This Court is of opinion, that neither of the three first objections, taken for the prisoner on his trial, entitles him to a *venire de novo*.

That to the evidence of the witness Hall, is entirely groundless. It would seem to be sufficient, if a witness, who is called to prove what another said or deposed to on a former occasion, swears that he is able to state all that was said on the subject of controversy, at the time to which his testimony refers. At all events we hold it sufficient to admit a witness, who says, that he can state all that passed on the occasion when that conversation occurred, whether relative to the controversy or any other subject. Such was the state of the facts in this case. The declarations of the prisoner at another time, or his conversations with Price or another person upon a different occasion, were not admissible evidence, whether proved by this or any other witness. Besides, the exception does not set out the testimony given by Hall; and, for ought that we can tell, the declarations proved by him may have been irrelevant, and, so, harmless; or they may have been beneficial to the prisoner. It is neces-

sary, that the appellant should show in his exception some error to his prejudice, otherwise this Court cannot undertake to set aside the solemn verdict of the jury.

We do not see the least ground for saying, that the prisoner's confessions were obtained by any undue means —either threats, or promises, or any other improper influence; but they appear, as far as we are at liberty, or can judge, to have been "free and voluntary," as the expression of the books is. It is impossible to hold, that the mere presence of a gentleman, holding the respectable station of Vice Consul under a foreign Government, could place the prisoner, while under examination before a Magistrate of this Country, under any inducement, but that of his own will, to make a confession; or that putting a question to him by that gentleman, the nature of which, if put, the witnesses could not state, could have any such effect: and that, the more especially, when the Magistrate, according to his duty and the dictates of humanity, not only once, but twice cautioned the prisoner against making a confession and informed him that, if he did, it might be used against him. It was contended in the argument, however, that the confession was extorted by a threat of the Magistrate himself, in saying to the prisoner, "that unless he could account for the manner in which he became possessed of Rodney's watch, he should be obliged to commit him, to be tried for stealing it." This was treated as a demand on the prisoner, that *he should tell* how he came by the watch, under the penalty of imprisonment. But that is doing great violence to the language and purpose of the examining Magistrate. The prisoner was not asked *to tell* any thing about the matter; but he was required to *account* for his having the watch, that is, to account for it by proof, and not by any declaration of his own, in order, as the Magistrate humanely informed him, he might thereby repel the legal presumption, that he came dishonestly by the article, of which the owner, it appeared, had been robbed the night

before. So far from that communication being capable of being regarded as a threat, it was really sound legal advice, calculated to put the prisoner upon a proper defence, if he could establish his case by proof. And that such was the purpose of the remark is obvious from two considerations. The one is, that no statement of the prisoner, merely, could have been sought by the Justice, as *that* could not satisfactorily "account" for the prisoner's possession of the watch, so as to authorize his discharge. And the other is, that the Magistrate perceived, that the prisoner, notwithstanding his previous caution, was as he thought, about to state, how he got the watch, and immediately, in order to correct any possible misapprehension of the prisoner and to apprize him of the consequence, cautioned him again not to make any confession. More could not have been done to put the prisoner upon his guard and instruct him as to his rights. But he persisted in the resolution to confess, declaring that he would tell all he knew about the matter; and he went on, accordingly, to admit his perpetration of the robbery. It would seem, that if any confession is to be deemed voluntary, and to flow from a sense of the obligation of truth, this must.

We likewise hold, that his Honor directed the jury correctly as to the effect they might allow to the prisoner's confessions. There was, indeed, evidence in corroboration of the confession, namely, the injuries inflicted on Rodney, which added greatly to the credit, to which the confessions, in themselves, might be entitled. But we believe, that it is now held by Courts of great authority, that an explicit and full confession of a felony, duly made by a prisoner, upon examination on a charge before a Magistrate, is sufficient to ground a conviction, though there be no other proof of the offence having been committed. We are aware that speculative writers do not agree in opinion entirely upon the respect due to evidence of this character. This is much like the diversity of opinion among legal essayists, upon the sufficiency of the

unsupported testimony of an accomplice to justify a conviction. Notwithstanding the doubts thrown upon the point in that manner, persons, having the responsibility of the judicial station, were obliged, when once the evidence was held admissible, to leave its sufficiency, according to the evidence actually yielded to it, to the jury, whose province it is to say, what the fact is. There are many cases to the effect, that there may be a conviction upon it alone. 1 *Leach. Cr. C.* 464, 478. *State* v. *Haney*, 2 Dev. and Bat. 390. *State* v. *Weir*, 1 Dev. 363. So upon the question in this case, Chief Baron GILBERT, for example, deems a confession evidence of the highest and most satisfactory kind, *Gilb. Ev.* 123; while Mr. BLACKSTONE, 4 *Com.* 357, expresses quite a contrary opinion, that it is the weakest and most suspicious of all evidence. We might be at some loss in selecting, between two such eminent authors, a guide on this question. But we are relieved from that necessity by judicial decisions, which seem to have settled the question, and therefore may be safely adopted. In *Eldredge's* case, Russ. and Ry. Cr. Cases 440, the presiding Judge told the jury, that, independent of the prisoner's confession, there was, in his opinion, no evidence of a felony, and he left the case to them on the confession alone; and all the Judges held a conviction on that evidence right. The case of *Rex* v. *Falkner & Bond*, Id. 481, was similar, and with the same result. *Rex* v. *White & Langdor*, Russ. & Ry. 507, is to the same effect; and in the next case, that of *Rex* v. *Tippet* all the Judges thought the conviction right, as there was some evidence, besides the confessions, which made it probable that the felony had been committed, and a majority of the Judges held, that, without the other evidence, the prisoner's confession was evidence, upon which the jury might convict. These recent decisions, to say nothing of the earlier ones in *Wheeling's case*, 1 Leach 311, and in *Lambe's case*, 2 Leach 554, fully bear out his Honor in the instructions he gave upon this trial.

It is not sufficient to impugn the principle established by them, that there have been instances, in which men have charged themselves with offences, which they did not commit, or which had never been perpetrated. For that argument would destroy all confidence in evidence, circumstantial or direct; since, by each, human tribunals have been or may be misled. But the administration of justice cannot depend upon such nice possibilities. It may safely, and, indeed, must necessarily, proceed upon the common experience of men's motives of action and of the tests of truth. Now few things happen seldomer, than that one, in the possession of his understanding, should of his own accord make a confession against himself, which is not true. Innocence or weakness is therefore sufficiently guarded by the rule, which excludes a confession unduly obtained by hope or fear. Hence, if one pleads guilty, there must be judgment against him. So, after a plea of not guilty, if the accused will make to the jury a plain and open declaration of his guilt, including all the facts, which go to make up the offence legally, the Court can do no less than tell the jury, they may act on such a declaration, and that it renders other evidence unnecessary. Of the same grade of evidence, precisely, is a confession out of Court, provided only it be fully proved and appear to have flowed from the prisoner's own unbiassed will. Such a confession, which goes to the whole case, is plenary evidence to the jury.

His Honor next instructed the jury, that whether the robbery was committed in the street of Wilmington or on the wharf described in the exception, it was a highway robbery. In that position, the Court is of opinion, there was error. It is true, there was evidence, on which the jury might well be supposed to have found the robbery was in the street, and, if they had said so, this difficulty would have been removed. But as they did not state, where they believed the act to have been done, we must, under the instructions, assume it to have been on the

wharf. The description of the wharf and the relative positions of it and the street do not appear very explicitly in the case. It is possible, the wharf may form part of the street, at its termination; for example, as some are made for ferry landings. But we cannot assume it to be so, especially as the presiding Judge distinguished between the street and the wharf, as being different places. The most we can presume is, that the public freely and rightfully used it; as it is stated that, although there were, near it, other wharfs, that were private property, this was not enclosed and was used by the public, and no private right in it is suggested. But, supposing it to be a public wharf, or a county wharf, as it is said such wharfs are sometimes called, the doubt arises, whether it be a public highway; for, if it be not, this indictment is not sustained. The statute takes away clergy from the offence of "robbing any person in or near any public highway;" and as this indictment has but one count and that charges the robbery *in* the highway, and it is found to have been on the wharf, the evidence does not support the allegation, unless it be true that the wharf is a highway. We speak thus, although the wharf is taken to abut on the street, and the latter is undoubtedly a highway in the strictest sense; so that a robbery *on* the wharf would be within the statute, as being done "near" the highway. But as the place in this case is material, it is necessary, we think, to state it truly, in the words of the act, either as being *in* or *near* the highway, so as to facilitate a defence upon *autre fois acquit* or *convict*.

It is true that Lord HALE, 1 *Pl. C.* 535, says, that an indictment of a robbery *in vel prope altam viam regionem*, though in the disjunctive, was usual at Newgate, though an indictment ought to be certain; and it is to be inferred from the whole passage, that proof that it was committed either in the highway or near to it would support the indictment, and enable the jury to find it, so as to oust clergy. But Lord HALE does not mean to lay it down,

that it is a necessary form of the indictment, that it should in every case state the robbery to be "in *or* near the highway," but only that it was admissible and usual; and that when so laid, it would be sustained by evidence of a robbery at either place. It is clear from the precedents, that they often laid the offence to be *in* the highway, by itself, and often laid it to be *near* the highway, according, probably, to the facts; and it is probable that it was frequent to have two counts, the one laying it *in*, and the other *near*, the highway. We own, that were it not for the great authority of Lord HALE, we should have thought one count in the disjunctive bad. But although indictments for robbing in *or* near the highway were tolerated, and under such an one the proof might be of the one or the other, yet fairness to the prisoner and all legal analogy require, that, when the offence is laid positively to have been committed in *one of those* ways, it ought to be proved as laid, and not in the other mode. As we conceive, therefore, this indictment would not be sustained by evidence, that the place of the robbery was not *in*, but *near* the highway. The members of the Court are not familiar with such subjects, and, perhaps, may err from not knowing, how persons engaged in commerce regard those places, and to what actual uses they are directed or can rightfully be applied. *A highway* is well understood in the law. It is said in England, that there are three kinds; but they all agree in this, that they are common to all persons to pass and repass at pleasure. We know of but one kind here, as yet; namely, public roads or streets, over which all citizens may go at will on foot, or horse back, or in carts or carriages. They are thorough-fares, over which people travel from one part of the Country to another. But a public wharf does not seem in its nature to be a highway, in any sense in which we have found either word used. A wharf is sometimes made on the land at the water's edge, and is sometimes built in the water to the channel of a river or

other part, and is a space, as we take it, for the deposit of goods, in order conveniently to lade and unlade vessels. To those ends drays, carts, and other vehicles of burden go on them to carry or take away merchandize, and the merchants go also, either on foot or otherwise according to their health or convenience, to look to their property and conduct their business. A public wharf is, for those purposes, no doubt, open to all persons. The public have an interest in it, so that it is not *privati juris* only; and in that sense "it is *like* a public street" as was said in *Bolt* v. *Stennett*, 8 T. R. 606. But it does not follow, that it is a *highway*, any more than a Court House or a Church is, because the former is open to all persons to witness the administration of justice, and the latter to worship in. The public use of a wharf is not to pass from place to place over it, but it is merely for the convenience of commerce abroad, that is carried on in ships. With these views of the question, we must hold, that a public wharf, merely as such and not being part of a street, is not a highway; and, consequently, that the prisoner was improperly convicted.

As the case will, probably, be tried again, it is proper to notice an objection taken, on the argument here, to the indictment. It charges a felonious assault in the county of New Hanover on the 29th of March, 1847, "in the common and public highway of the State, in and upon one J. H. R. then and there being in the peace &c. and him the said J. H. R. in bodily fear and danger of his life in the highway aforesaid, then and there did feloniously put, and one silver watch of the value &c. of the proper goods &c. from the person and against the will of the said J. R. H. in the highway aforesaid then and there feloniously and violently did steal, take and carry away, against the peace and dignity of the State." It was contended, that the indictment was insufficient, because, although it charges the putting in fear in the beginning of the indictment, it does not state *the robbery*

to have been *by means* of such putting in fear or by violence. A sufficient answer to this argument is, in the first place, that the indictment in that respect is according to the ancient precedents, as appears in *Tremain* 288, and *Dogherty's Cr. Cir. Comp.* 682. But in truth, the indictment does charge the robbery to have been by those means. It states the putting in fear first, and then proceeds, that the prisoner one watch from the said &c. "then and there" feloniously and "violently" did steal. It is clear therefore that by means of the "*ibidem* and *tunc*," the verdict connects the putting in fear and the stealing together, so as to make the whole one transaction. But, if that were otherwise, it expressly charges a taking in the highway, from the person, and against the will of the owner, "feloniously and *violently*;" and thus makes violence *the means* of effecting the robbery, which alone is sufficient according to Mr. BLACKSTONE. He states that it is not necessary, though usual, to lay in the indictment, that the robbery was committed by putting in fear, but that it is sufficient, if it be laid to be done with violence. 4 *Bl.* 243. The same appears from *Donally's* case, East. C. L. 783. Indeed that results from the definition of robbery, which is a taking by violence, *or* by putting in fear. The indictment would therefore do, if it had been supported by evidence of a robbery *in* the highway, instead of one *near* it.

PER CURIAM. Judgment reversed and *venire de novo*.

STATE vs. O'NEAL.

There is no obligation on a Judge to interrupt counsel in stating their conclusions, either of law or fact. It is the right and the duty of the presiding Judge, if counsel state facts as proved, upon which no evidence has been given, to correct the mistake, and he may do it at the moment, or wait till he charges the jury—perhaps the most appropriate time.

In criminal charges, the prisoner's character cannot be put in issue by the State, unless he open the door by giving testimony to it. But it is not a conclusion of law, that from his silence, the jury are to believe he is a man of bad character.

An omission on the part of a Judge to instruct the jury on a particular point, if no instruction be asked from him on that point, is not error.

In an indictment for altering the mark of a cattle-beast, it is not necessary to set forth the original mark nor in what manner the alteration was made.

The cases of *State* v. *Collins*, 3 Dev. 117, and *State* v. *Davis*, 2 Ired. 153, cited and approved.

Appeal from the Superior Court of Law of Edgecomb County, at the Spring Term, 1847, his Honor Judge BAILEY presiding.

The prisoner is indicted for altering the mark of a cow, belonging to Martha Benson. The words in the indictment, describing the offence, are "unlawfully, knowingly and wilfully did alter the mark of a certain cow, the property of Martha Benson," charging the intent. No evidence was offered by the defendant of his good character. The Attorney General, in the course of his argument to the jury, stated, that the State was not at liberty to give evidence of the prisoner's character, but that the prisoner had a right to do so; that he had not availed himself of the privilege; and, from the absence of such testimony, was proceeding to argue, that he was a man of bad character, when he was interrupted by the prisoner's counsel, who insisted that, as no evidence had been offered as to character, the Attorney General had no right to comment upon it. The Court over-ruled the objection and permitted the Attorney General to proceed with his argument. The prisoner was convicted and a

rule for a new trial obtained, because the Court permitted the Attorney General to make to the jury the remarks he did, on the character of the prisoner. The rule was discharged. The defendant then moved in arrest of judgment, because of the insufficiency of the indictment, in not charging the particular mode, in which the mark was altered. The motion was over-ruled and judgment pronounced, from which the prisoner appealed.

Attorney General, for the State.

B. Moore and *Mordecai*, for the defendant.

NASH, J. It is the privilege of parties to be heard at the Bar through their counsel, and a wide latitude is given to the latter in making their argument to the jury. Nor do we know of any obligation on a Judge to interrupt counsel in stating their conclusions either of law or fact. It is the right and the duty of the presiding Judge, if counsel state facts as proved, upon which no evidence has been given, to correct the mistake, and he may do it at the moment or wait until he charges the jury, perhaps the most appropriate time. In criminal charges the prisoner's character cannot be put in issue by the State, unless he open the door by giving testimony of it —nor is it a conclusion of law, that, from his silence, the jury are to conclude he is a man of bad character. Our attention has been drawn by the Attorney General to the case of *Vane*, 12 *Wend.* 78, 82. It certainly sustains him in his position, but we do not feel disposed to follow it. We much prefer the rule established by this Court in the case, the *State against Collins*, 3 Dev. 117. From the charge of the presiding Judge we learn, that no evidence was offered by the defendant to show that he was a man of good character. "The Counsel argued to the jury, that if they would not be justified by the testimony to convict the most respectable of their acquaintance, they would not in law be justified in convicting the prisoner.

The jury was instructed that was not the true rule. That when a defendant introduced no such testimony, the true rule was, that if the evidence would not justify them in returning a verdict against a person of whom they had never heard before and of whom they knew nothing, but what was disclosed by the testimony, then it would not justify a verdict against the defendant." This opinion was adopted by the Supreme Court. The rule is then established that no deduction results in law unfavorable or favorable to the character of an individual, charged by an indictment, from the fact that he has introduced no evidence to shew he is a person of good character. The character, not appearing either good or bad, necessarily stands indifferent. Such is the rule in this State, and so we doubt not the presiding Judge would have charged the jury, if it had been required of him, but it was not asked. This Court has repeatedly decided, that an omission on the part of a Judge to instruct the jury on a particular point was no error. If the party deem it material to his case, he must ask for instruction upon it. If the Judge then neglect or refuse to give the instruction, or does not lay down the law correctly, it will be error, for which a new trial will be granted.

The motion in arrest of judgment cannot avail the defendant. The indictment uses the language of the act. But it is true that this, in all cases, is not sufficient. Thus in an indictment under the Statute for stealing a slave, the name of the slave must be set forth, and so in an indictment for forgery, the instrument forged must be set forth; and it is a general rule "that the special matter of the whole fact ought to be set forth with such certainty, that it may judicially appear to the Court, that the indictors have not gone on insufficient premises," *Hawk. Book, 2, ch. 55, sec. 57*; that is, that the facts set forth amount to a criminal offence, as charged. The authorities, to which our attention has been directed by the Counsel for the prisoner, sustain his proposition, but not

his objection. The objection is that the indictment does not set forth the mark of Martha Benson, the owner of the cow, nor the mark into which the defendant put her; at least, as we understand it, the language of the objection is, that the indictment does not charge the particular mode in which the mark was altered. Pursuing the words of the Statute is sufficient, except in cases where the subject of the indictment cannot be brought within the meaning of the Statute, without the aid of extrinsic evidence. There is an indictment on the Statute of 37th *of George the* 3d, ch. 70, making it felony to *endeavor* to seduce a soldier or a sailor from his duty: it is sufficient to charge an *endeavor*, without setting out the means employed. *Rex* v. *Fuller*, 1st Bos. & Pul. 180. The *endeavor* to seduce, without any respect to the means, is the gist of the offence. *Arch. Cr. Pl.* 52. Now in the case before us, it is of no importance what Mary Benson's mark may be; it is made criminal by the Statute knowingly to alter it, with intent to defraud, and it is a matter of no importance into whose mark it is altered; it is the wilful alteration that constitutes the offence. In addition to this, the indictment conforms to the precedents heretofore in use in this State and sanctioned by this Court. In the case of *Davis*, 2d Ire. 153, the indictment is for effacing the mark, and the offence is described, as in this, by simply pursuing the words of the act. The mark of McConnell, the owner of the animal, is not set out nor is the mode of effacing it. It is true, that the motion in arrest of judgment did not rest on the objection now made; but the attention of the Court was drawn to the sufficiency of the indictment, and in every case the Court looks into the record, and, if any error is detected, then we do not wait to have it brought by Counsel to our notice. It cannot be supposed, then, that this objection, if a sound one, would have escaped the observation of the Court. It has indeed by some been supposed, that too much astuteness is exhibited in discovering errors in records sent here. If

it be desirable that the administration of the law should be kept steady and uniform, that the forms and precedents, established by the wisdom of our predecessors, should, as rarely as possible be departed from, it should be the object of every Court to stand *super antiquas vias*. The case of *Davis*, then, may be considered a precedent for the indictment we are considering.

We are of opinion there was no error committed by his Honor on the trial below, on either point decided by him.

This opinion will be certified that the Superior Court of Edgecomb may proceed to judgment.

PER CURIAM. Ordered accordingly.

WILLIAM L. MIZELL *vs.* MAURICE S. MOORE.

The plaintiff commenced his action of assumpsit on the 3rd of July, 1846. On the 13th when the Court, to which the action was returnable sat, the defendant pleaded as set-offs certain bonds of the plaintiff's due the 3rd of July. On these bonds the defendant had sued out warrants against the plaintiff on the 7th of July and recovered judgments on the 10th of July 1846. *Held*, that these bonds could not be introduced as set-offs, because they were merged in judgments before the plea pleaded.

A set-off must not only be due at the commencement of the suit, but must continue to be due in the same form, when pleaded.

The case of *Haughton* v. *Leary*, 2 Dev. & Bat. 21, cited and approved.

Appeal from the Superior Court of Law of Martin County, at the Spring Term, 1847, his Honor Judge BAILEY presiding.

This is assumpsit for goods sold, and was commenced on the 3rd day of July, 1846. The defendant pleaded, amongst other things, non-assumpsit, and a set-off due to

him on three several sealed notes of the plaintiff. Upon the trial the plaintiff proved his demand; and the defendant then produced the three bonds, as described in his plea, which were due before and on the 3rd day of July 1846. They appeared to have been cancelled by having the word "Judgment," written across the face of them, and it was then established, that on the 7th day of July 1846, the defendant sued out three warrants against the plaintiff on the bonds; and on the 10th of that month obtained judgments thereon, before a Justice of the Peace; and that the defendant therein (the present plaintiff) then staid them by giving security according to the Statute, which stay expired on the 10th day January 1847. The trial of this suit was in February 1847, and at that time no execution had issued on either of the three judgments, and they remained unpaid.

Upon this evidence, the plaintiff insisted, that the defendant was not entitled to any set-off in this action. But the Court held otherwise; and the jury found for the plaintiff on the first issue; and assessed his damages to $77 51, for principal money and interest; and upon the other plea they found for the defendant, "a set-off to the amount of $82 69, that is to say, on one bond, upon which a judgment has been obtained, with the interest and costs, to the amount of $42 02, and on one other bond, upon which a judgment has been obtained," &c. Upon the verdict, there was judgment for the defendant for his costs; and the plaintiff appealed.

Rodman, for the plaintiff.
No counsel for the defendant.

Ruffin, C. J. The judgment must be reversed. The defendant was not entitled to set-off his demands in this action in any form; neither as judgments, nor bonds. Not the former, because, they were rendered after the commencement of this suit, and were not due even when

the plea was put in, having been staid. Indeed the plea is of the bonds, and not of the judgments; and yet the jury allowed the defendant his costs recovered in those judgments as a part of the set-off here. But the bonds themselves were not good set-offs. For a set off must not only be due, at the commencement of the suit, *Haughton* v. *Leary*, 3 Dev. & Bat. 21, but it is plain that it must continue to be due in the same form, when pleaded. The Statute meant, indeed, to do away the necessity of a multiplicity of suits. But it does not oblige one, who is sued, to set-off his counter demand; and if he chooses to sue on it, and thereby produce the mischief the law designed to correct, he renounces the privilege of the Statute, and cannot afterwards claim it, so as to defeat his creditor's action and throw the costs on him. The defendant can no more set-off these bonds, after merging them in judgments, between the suit brought and plea pleaded, than he could, if at that time he had received payment of them. This, the very form of the defendant's plea shows. Taken from the precedents, it alleges, "that the plaintiff before and at the time of the commencement of this suit &c., was, *and still is* indebted to the defendant in &c., upon and and by virtue of a *certain writing obligatory* sealed &c., and now shown to the Court, &c., which said *writing obligatory*, at the commencement of the suit, was *and still is, in full force and effect, not released, paid off, satisfied, cancelled, or otherwise made void*," 3 *Chitty P. C.* 931, 936.

The Counsel for the defendant, in order to show that the change in the face of the evidences of the debt, does not defeat the set-off, has drawn our attention to that class of cases, in which the Court, where two persons have cross judgments, has satisfaction acknowledged or entered for the amount of the recovery and costs in the other. But that is a distinct jurisdiction, and not founded on the Statute at all. It is a discretionary power, exercised by the Court over its suitors for the purposes of promoting

justice and preventing the loss of costs in cases of insolvency or the like. But the attempt here, is not to set off one set of costs, or judgment against the other, but to compel the present plaintiff to pay the costs of his own action, as well as those of the defendants, by using the set off as a bar to the plaintiff, under the Statute.

PER CURIAM. Judgment reversed, and a *venire de novo*.

ROBERT ARMFIELD *vs.* THOMAS R. TATE, Ex'n. &c.

Where an infant purchased land and gave his note for the purchase money, and, after he became of age, continued in possession of the land and promised to pay the note, *Held*, that this was a confirmation of the contract by the infant, after he became of age, and he and his representatives were bound by it.

The circumstance, that the vendor was informed, before the completion of the contract, that the vendee intended the place as a residence for his kept mistress, does not vitiate the contract.

The law annexes no condition that the title-deeds shall be given, before a suit can be commenced on a note given for the purchase money.

Appeal from the Superior Court of Law of Guilford County, at the Spring Term, 1847, his Honor Judge MANLY presiding.

This action was assumpsit with three counts, 1st, upon a promissory note, (a copy of which is annexed,) 2d, upon oral promises to pay the sums therein mentioned; and 3d, upon a *quantum valebat* for a house and lot in the town of Greensborough. Pleas—the general issue and infancy, to which there were general replica-

tions, and to the latter the special replication, that defendant's intestate had promised since arriving at full age.

It was proved that the promissory note was given for a house and lot in the town of Greensborough, and at the same time a bond taken to make a title when the purchase money should be paid: That the intestate at the time was under age, but, after arriving at full age, continued to occupy and claim the lot as his property, and promised *expressly* to pay the purchase money. The defendant offered to prove that the plaintiff was informed, prior to the conclusion of the sale, that the premises were intended as a dwelling for a family, with one of the members of which the intestate was in the habit of illicit sexual intercourse, but the Court deemed the evidence immaterial and excluded it.

The defendant contended, that the plaintiff could not, in any event, recover the purchase money for the lot, and especially not until after a tender of a title deed. But the Court was of opinion, that the promise to pay, after arriving at full age, being established to the satisfaction of the jury, the plaintiff was entitled, and so instructed the jury. Verdict for the plaintiff. There was a rule for a new trial, 1st. Because of the exclusion of proper testimony. 2d. For misdirection by the Court. Rule discharged and appeal.

(Copy of Bond referred to.)

"$350. One day after date, I promise to pay to Robert Armfield the sum of three hundred and fifty dollars to be paid as follows, one hundred the 1st day of January 1842, one hundred dollars the 1st day of January 1843, and one hundred and fifty dollars the first day of January A. D. 1844, with interest from date. Witness my hand and seal, this 24th February, A. D. 1841. (Signed,)

ABSALOM T. HUMPHREY."

JOHN WORTH."

[*No seal attached.*]

No counsel for the plaintiff.

Morehead, for the defendant.

DANIEL, J. All deeds for infants, which are merely voidable, may be affirmed at full age. *MacPherson on Infancy* 487. An infant may purchase land and the vendor or donor is bound by his own act or deed. *Ib.* 455. All contracts may be confirmed or adopted by an infant, after he arrives at full age. *Ib.* 487. The defendant's intestate entered into the land, and continued the possession, after he arrived at full age. And he then promised to pay the note, which was given by him as the consideration for the land; this promise confirmed the contract on his part, and repelled the plea of infancy.

Secondly. The plaintiff being informed, before the completion of the contract, that the vendor intended the place as a residence for his kept mistress, does not destroy the contract. The way the vendor in fee intended to use his property, after he became the owner of it, would not prevent his paying the purchase money to the vendor, who had no control over the subsequent use of the land. The case cited by the defendant's counsel was not like this case; there, the lessor stipulated in the lease of his rooms, that the lessee might use them as a brothel. The Court held, that he could not recover the rent; because such a contract was against good morals, and void, as being against public policy. But here, the vendor enters into no stipulation, how the land is to be used; and he retained no reversionary interest in the land, as the lessor did in the case cited.

Thirdly. The title deeds were expressly agreed not to be given by the plaintiff, until the purchase money was paid. The law did not annex any condition precedent, that the title should be made, before suit could be commenced on the note, which is an independent security for the purchase money. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

DEN EX DEM. WILLIAM HOLLOWELL *vs.* GEORGE KORNEGAY.

A. by will in 1786, devised to his son R. a tract of land and then proceeded as follows: "And my desire is, if my son R die without heir lawfully begotten of his body, for it to be sold, and equally divided between his own sisters." *Held*, that the limitation over was too remote, and that estates tail having by the Act of 1784 been converted into fee simple estate, the son R. took an absolute estate in fee simple in the land devised.

The case of *Saunders* v. *Hyatt*, 1 Hawks 247, cited and approved.

Appeal from the Superior Court of Law of Wayne County, at the Spring Term, 1847. his Honor Judge PEARSON, presiding.

The premises were devised by Richard Martin in 1786, as follows: "I give to my son Richard my dwelling plantation; only my wife to live on one half of the land, during her widowhood and no longer. And my desire is, if my son Richard die without heir lawfully begotten of his body, for it to be sold, and equally divided between his own sisters." The wife died, and then Richard died in 1843, without having had issue. The defendant claims under conveyances in fee made by Richard, the son, in 1798. The testator left several daughters, and they all died before their father Richard, except Sarah Flowers, who is the lessor of the plaintiff in one count of the declaration. The testator appointed two executors, who died before 1843, and after the death of Richard, administration with the will annexed was taken out, and the administrator sold and conveyed the premises in fee to William Hollowell, who is the lessor of the plaintiff in the other count of the declaration. Upon these facts, which were agreed between the parties, the Superior Court was of opinion, that the title was in the defendant, and from a judgment for the defendant the plaintiff appealed.

J. H. Bryan, for the plaintiff.

Badger, and *Mordecai*, for the defendant.

RUFFIN, C. J. The judgment must be affirmed. There is nothing in the will to tie up the period for the limitation over to take effect, to lives in being and 21 years after, so as to make this an executory devise. "His own sisters" only means "his sisters," and cannot be understood as intending a benefit to the sisters *personally*, but only as vesting the interest in them. The case of *Saunders* v. *Hyatt*, 1 Hawks 247, is directly in point. The wills are almost literally the same. The only difference is, that the devise by Saunders was to his son, "and if he die without any heir lawfully begotten of his body, the testator orders the land to be sold and the proceeds divided among his sisters." But that difference is entirely immaterial, as in each case the disposition over is after the death of the first taker "without heir lawfully begotten of his body," that is, of a remainder after an estate tail in possession; which the act of '84 makes void. The fee vested in Richard, and is now in the defendant. The decision of this point renders it unnecessary to consider the others, in respect to the power of the executors to sell under this will, and that of the administrator under the act of 1836.

PER CURIAM. Judgment affirmed.

HIRAM PHELPS *vs.* SALLY CALL.

It is of the essence of a bond to have an obligee as well as an obligor; it must shew upon its face to whom it is payable.

The defect cannot be supplied by shewing a delivery to a particular person. The case of *Graham* v. *Holt*, 3 Ired. 302, cited and approved.

Appeal from the Superior Court of Law, of Davie County, at the Spring Term, 1846, his Honor Judge CALDWELL presiding.

This was a summary proceeding under the Act, *Rev. Stat. ch.* 45, *sec.* 17, 18, to obtain judgment on a bond given by the defendant for the forthcoming of property levied on by a constable. The paper produced as the bond was as follows:

"Know all men by these presents, State of North Carolina, Davie County, that I the undersigned bind myself in a bond of ninety dollars for the forthcoming of a waggon in the possession of Samuel Drake, executed and levied on as his property by A. Sheets, deputised, to the use of A. Taylor. It is to be delivered twenty days from this day and date, Sundays excepted, this, May 27th, 1843, whereunto I set my hand and seal.

(Signed.) SALLY CALL."

Witness, J. J. SPARKS.

The witness Sparks proved the execution of the paper writing and its delivery to the said Sheets, and it was thereupon read in evidence. The defendant objected to a recovery on it, because it did not appear that the said bond was payable to any one. This question was reserved, the trial proceeded, and the jury rendered a verdict for the plaintiff. On the question reserved, the Court was of opinion with the plaintiff. Judgment was rendered for the plaintiff and the defendant appealed.

Boyden, for the plaintiff.
Craige, for the defendant.

This is a proceeding, under the acts of 1807, 1822 and 1828. *Rev. Stat. ch.* 45, *sec.* 17, 18. The case is as follows: In the year 1843, one Almon Taylor obtained a judgment before a Justice of the Peace, against Samuel Drake, an execution was issued, and placed by him in the hands of A. Sheets, who was deputised by a Magistrate to execute it. The officer levied the execution on a waggon, as the property of the defendant, and left it in his possession. For the forth-coming of the waggon, the paper, upon which the proceedings are founded, was executed by the defendant and delivered to the officer

RUFFIN, C. J. The judgment must be affirmed. There is nothing in the will to tie up the period for the limitation over to take effect, to lives in being and 21 years after, so as to make this an executory devise. "His own sisters" only means "his sisters," and cannot be understood as intending a benefit to the sisters *personally*, but only as vesting the interest in them. The case of *Saunders* v. *Hyatt*, 1 Hawks 247, is directly in point. The wills are almost literally the same. The only difference is, that the devise by Saunders was to his son, "and if he die without any heir lawfully begotten of his body, the testator orders the land to be sold and the proceeds divided among his sisters." But that difference is entirely immaterial, as in each case the disposition over is after the death of the first taker "without heir lawfully begotten of his body," that is, of a remainder after an estate tail in possession; which the act of '84 makes void. The fee vested in Richard, and is now in the defendant. The decision of this point renders it unnecessary to consider the others, in respect to the power of the executors to sell under this will, and that of the administrator under the act of 1836.

PER CURIAM. Judgment affirmed.

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Craige, for the defendant.

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Sheets on the 27th of May 1843. The notice in this case issued the 29th day of July 1845. In the meantime Sheets had died; and the plaintiff administered upon his estate. Several questions were made on the trial of the cause in the Superior Court. We deem it unnecessary, to notice any but the first objection taken by the defendant. It lies at the foundation of the plaintiff's claim. The act requires of an officer, who levies an execution on personal property, to take a *bond* from the defendant for its forth-coming, when he leaves it with the owner. The paper writing, taken by Sheets, is not a bond; it is made payable to no one. It is of the essence of a bond to have an obligee as well as an obligor—it must show upon its face to whom it is payable. *Hurleston on Bonds*, 2 Com. Dig. title Obligation. This was expressly so decided by this Court, in the case *Graham against Holt*, 3d Ire. 302. In a declaration on this Instrument, in an action on it, the plaintiff could not supply the defect by an averment; if he did, the defendant might demur, for the declaration would show that there was no obligee, no one to whom the obligor was bound. As this objection lies at the threshold of the plaintiff's claim, we have as before stated confined our attention to it.

Per Curiam. Judgment reversed and judgment for the defendant.

STATE vs. JOHN L. LEE.

In a case of bastardy, after the defendant has had an issue tried under the Statute, and the verdict is against him, it is too late for him to move to quash the proceedings, because the mother of the child, who was examined before the Magistrates on oath, was a woman of color.

The cases of the *State* v. *Ledbetter*, 4 Ire. 243, *State* v. *Patton*, 5 Ire. 180, and *State* v. *Robeson*, 2 Ire. 46, cited and approved.

Appeal from the Superior Court of Law of Craven County, at the Spring Term, 1847, his Honor Judge PEARSON presiding.

The defendant was arrested upon a charge of Bastardy. A warrant was duly issued by a couple of Magistrates against Catharine Curtis, a single woman, who upon her examination, charged the defendant with being the father of her child. The defendant was bound to the County Court. Upon the return of the proceedings, the issue was made up, to try the fact, whether the defendant was the father of the child. These proceedings took place at May Term, 1846, of the County Court, and the cause was continued, until August Term following, when the defendant moved the Court to quash the proceedings, because it did not appear in the warrant and examination, that the child was, at the time the warrant issued, under three years of age, whereupon the Magistrates, being in Court, were, on motion, permitted to amend the proceedings. The defendant then moved for permission to withdraw his issue, which was refused, and upon its trial before a jury, a verdict was returned that the defendant was the father of the child. Upon this finding, the County Court made, what is called, an order of filiation. The defendant then moved to quash this order, upon the ground, that the witness, Catharine Curtis, was a colored woman, and, therefore, incompetent to give evidence against a white man. This motion was refused and the defendant appealed to the Superior Court from it, as well as from

the other "orders in the case." In the Superior Court, the motion to quash the order of filiation, made by the County Court, was again made and refused by the presiding Judge. A verdict was returned in favor of the State, a writ of *procedendo* was ordered and the defendant appealed.

J. H. Bryan, for the State.

Stanly, who had been engaged before his appointment, for the defendant.

NASH, J. It is important to ascertain from what the defendant did appeal, and what was his complaint in the Superior Court. The record informs us, that after the trial of the issue in the County Court, an order of filiation was made, and the counsel moved to quash the order, because the mother, upon whose examination he was charged, was a coloured woman. This motion was refused, and "from this decision as well as the other orders made in the case, the defendant appealed." Three motions were made by him in the County Court, all of which had been over-ruled; the first, to withdraw his issue; the second, to quash the proceedings, for irregularity, because the warrant and examination did not show that the examination was taken, within three years before the birth of the child. These two motions were made before the issues were tried, and the third, not until after the trial. On the return of the case to the Superior Court, the defendant again renewed his motion to quash the order of filiation, made in the County Court, and for the reason there assigned, which was refused.

The Act of 1814, under which these proceedings are had, was passed for the purpose of removing the extreme severity of that of 1741, which permitted no man to escape from the effects of the oath of the mother of a bastard child. The former Act makes the examination of the mother, *prima facie*, evidence of the fact, but it

was not intended to deprive the defendant of all opportunity to show his innocence. Accordingly, it is provided by the 4th section, of what is called the *Bastardy Act*, "that the person accused, shall, upon the return to the County Court, &c. be *entitled* to have an issue made up to try, whether he be the father of such a child," &c. *Rev. Stat.* ch. 12, sec. 4. The issue is given to him, for his protection, and he may abandon it, whenever he pleases. The defendant had, therefore, a right to withdraw the issue, and it was error in the County Court to refuse it. When the case came into the Superior Court, he did not renew that motion on the second, nor was the attention of that Court in any manner called to them. The defendant then must be considered, as having abandoned them, and to have thrown himself entirely upon the third. Upon that alone, the Court was called on to say, whether the County Court had committed an error. The whole ground upon this point is covered by the case of *Ledbetter*, 4th Ired. 243, or rather by the principle stated, as governing cases of the kind. If for this defect. the defendant had, in the County Court, before the trial of the issue, moved to quash the examination of the woman, and it had been refused, he might either have appealed to the Superior Court or taken his case there by *certiorari*. By so doing, he would have put the decision of his case distinctly on the defect, the competency of the witness. This course he did not pursue, but first tried the issue, and, after a verdict against him, claimed the benefit of the objection. At that time the County Court could not hear his motion. The verdict of the jury, upon the issue, constitutes evidence of paternity "legally complete," and, upon its finding, he stood, by force of the statute, "charged with the maintenance of the child," and the only course which the Court would pursue, while the verdict remained upon the record, was to pass the orders directed and to exact from the defendant bond with sufficient sureties, for the indemnification

of the County. No defence is given by the law to any one charged either civilly or criminally, of which he may not avail himself, but to do so, he must make his application, by plea or motion, in due order and apt time. In this case, no objection was made to the regularity of the examination, on account of the incompetence of the woman, until after the trial of the issue in the County Court. The objection could not be made on the trial, because the Act says, the examination *shall* be evidence. *State* v. *Patton*, 5th Ired. 180. *State* v. *Robeson*, 2 Ired. 48. It could not be made afterwards, because it could have no operation, as the verdict of the jury concluded the defendant. If the defendant had appealed from the finding of the jury and the order made thereon simply, and without having made the motion to quash, he would have been entitled merely to a trial of the issue *de novo* in the Superior Court, and he could not have made the motion to quash *ab origine* in the Superior Court, because it was not incidental to the trial of the issue, that the Court should or should not adjudge the woman's examination to be quashed, upon the score of her incompetency. Therefore, that point arose upon the appeal of the defendant from the refusal of the County Court to quash, as a distinct question, and consequently must have been determined in the Superior Court, as upon a writ of error, upon the same principles and under the same circumstances, in which the point was decided in the County Court. As then the County Court, as has been shewn, properly refused the motion at the time it was made, the Superior Court did right in not reversing but affirming that order.

PER CURIAM. Judgment affirmed.

DICKERSON RICKS *vs.* MARTHA BATTLE.

If A. employ a crier or auctioneer, to cry property at a public auction, without directing him not to cry the bid of B., and B. is the last and highest bidder and the property is knocked off to him, then the contract is complete, provided B. complies with the terms of auction.

It is no defence to an action by B against A. for a breach of this contract, that A. had previously told B. his bid should not be received, unless she so directed the crier or auctioneer, or unless she objected at the time of the bidding and before the property was knocked off.

Appeal from the Superior Court of Law of Nash County, at the Spring Term, 1847, his Honor Judge BAILEY presiding.

This was an action brought to recover damages for the violation of a parole agreement. The evidence was, that the defendant had charge of several negroes, belonging to the infant children of Lawrence Battle. She was not their guardian, but acted as their next friend in hiring them out. The defendant advertised, that she would hire these negroes on the 5th of January 1846, at the Court House door; on that day she brought the negroes to the Court House, and employed one Griffin to cry them, and one Smith to keep the account of hires and take the notes. The terms of hiring were written on a piece of paper, and read to the persons, who were assembled at the hiring. It was objected by the defendant, that the witness could not speak of the terms, unless the paper was produced. This objection was over-ruled; and the witness stated, that the terms as read from the paper were, that all persons, who hired negroes, should give bond with approved security and that they should be well clothed. Mr. Griffin, the crier, stated that he put up a negro woman to the highest bidder, that the plaintiff bid for her loud enough for him to hear, that many persons were present and that the defendant was present, that he was standing at the door of the Court House, and she was back in the

passage, but whether she heard the bid made by the plaintiff or knew that he was bidding, he could not state; that the defendant had not told him not to cry the plaintiff's bid—that after the plaintiff bid, some other persons bid, and the plaintiff continued to bid by nods or winks, which he understood as bids—that this manner of bidding was not unusual, but that others bid in the same way for the negro woman—that the plaintiff was the highest and last bidder, and the negro woman was knocked off to him; and Mr. Smith stated, that he entered his name upon the book which he kept, as the hirer of that woman. In a short time the plaintiff offered his note with good security for the hire, but the defendant refused to receive the same and refused to deliver the negro woman. The defendant then offered to prove, that the plaintiff had the character of a cruel man to negroes, and that he was unfit to have any control over them. This was objected to by the plaintiff and rejected by the Court. The defendant then offered to prove, that, before this hiring, the defendant had said to the plaintiff, that he should never have any negroes, over which she had any control, alleging as a reason that he was a cruel man, that she was afraid he would kill them and that he was poor and unable to feed them. The plaintiff objected, but the testimony was received. The witness stated that twelve months before, at the hiring of these negroes by Nicholas Arrington, the defendant told the plaintiff he should never hire any negroes that she had the management of, that he was a cruel man to slaves and that she would be afraid that he would kill them, and that he would not give them enough to eat; and that, at another time, she told the plaintiff he should not have any negroes she had the control of. It was furthermore in evidence, on the part of the defendant, that, a few minutes before the hiring commenced, the witness heard the defendant say to the plaintiff, he should not pester her about the negroes, that she intended to take all the women herself; that imme-

diately after the woman was knocked off, the defendant declared that the plaintiff should not have the woman, assigning as a reason that he was a cruel man to negroes. The Court charged the jury, that, if the defendant employed Griffin to cry the property, as her agent, without informing him, that he was not to cry the bid of the plaintiff or without making that known, when the negro was put up, and the plaintiff was the last and highest bidder, and the property was knocked off to him, that the act of the crier was the act of the defendant, and that his assent was her assent; that the contract of hiring was complete, provided the hirer tendered a good and sufficient bond for the hire, and this was a question for them; that, if the defendant had told the crier not to cry the plaintiff's bid, she had a right to do so, and if the crier had, notwithstanding, cried his bid and knocked off the property to him, she would not be bound by it, although he professed to act as her agent; that, although she had informed the plaintiff before this hiring, he should never hire any negroes put under her charge, or, if just before the hiring out, she said to him he should not have any of the negroes and she afterwards permitted the hiring to go on and the negro woman was knocked off to him, it was too late, after the negro was knocked off, to say, that he should not have her; and if the plaintiff tendered a good bond agreeably to the terms of hiring and she refused to deliver the woman, the plaintiff was entitled to recover nominal damages. Under these instructions, the jury found a verdict for the plaintiff. Rule for a new trial for misdirection. Rule discharged and the defendant appealed to the Supreme Court.

H. W. Miller, for the plaintiff, submitted the following argument:

First—The terms of a hiring having been read from a paper at the time and place of hiring, can parol evidence be given of those terms without the production of, or notice to produce, the paper?

It is submitted that this is not of that kind of written instruments, which the rules of evidence require the production of, or notice to produce, before their contents can be spoken of or explained by parol. There is no evidence, that it was signed by any one—it was a mere notice to the public of the terms of hiring—and amounted to nothing more than a mere memorandum to guide or assist the memory of the person, who announced the terms. It cannot claim as high a character as a letter, giving notice of the dishonor of a Bill of Exchange, to an Endorser. This Court has decided that "the contents of such letter may be proved by parol without notice to produce the original." *Faribault* v. *Ely*, 2 Dev. 67. Nor does it come as near within the rule of Evidence as a paper, from which a demand is read aloud in the presence of a defendant, before suit brought. *Vide* decision of this Court in *Black* v. *Ray*, 1 Dev. & Bat. 334.

Second—Was the Evidence as to the plaintiff's cruelty to negroes properly rejected?

It is submitted, that it was entirely *irrelevant* to the issue, and that however cruel the plaintiff may have been considered, it had no bearing on the question whether there was a contract of hiring at the time specified, made according to law, between the plaintiff and the defendant. Such an examination was only calculated "to prejudice and mislead the jury."

Third—It is submitted that there *was* a contract of hiring.

The auctioneer is the agent of his employer and binds that employer on "knocking down his hammer," provided he has not instructions to the contrary.

"A bidding at an auction may be retracted before the hammer is down. Every bidding is nothing more than an offer on one side, and which is not binding on either side, until it is assented to, and that assent is signified on the part of the seller by knocking down the hammer." *Kent Com.* 2 vol. 537.

B. F. Moore, for the defendant.

DANIEL, J. This case has been argued by Counsel. We have considered it, and have come to the same conclusions that his Honor did, upon each and every point, and for the very reasons given by him.

PER CURIAM. Judgment affirmed.

MEEDS *vs.* CARVER.

The plea of not guilty to an action of trespass on the person, merely denies that he committed any trespass at all.

If, in such an action, the defendant hath matter of justification, he cannot give it in evidence under the general issue, but must plead it specially.

Appeal from the Superior Court of Law of Pasquotank County, at the Spring Term 1847, his Honor Judge CALDWELL, presiding.

The action is trespass and false imprisonment, and the plea not guilty. On the trial the defendant showed, that he was Sheriff of Pasquotank, and he offered in evidence a precept from a Justice of the Peace, which is set forth in the exception, and was directed to any lawful officer, and delivered to one of his deputies, who arrested the plaintiff thereon, and committed him to jail. The defendant insisted that the precept was a *capias ad satisfaciendum*, and authorised the arrest and imprisonment of the plaintiff; whereas the plaintiff contended that it was void, and did not justify the officer. His Honor was of opinion that the process, though not strictly formal, was valid and justified the defendant; and therefore directed

the jury to find for him. There was accordingly a verdict for the defendant, and from the judgment the plaintiff appealed.

Badger, for the plaintiff.
A. Moore, for the defendant.

RUFFIN, C. J. We are obliged to reverse the judgment, without reference to the question, whether the process be valid as a *ca. sa.* so as to authorise the arrest; because, upon the pleadings in this case, it was not competent to the defendant, to set up that defence. In actions for trespass on the person, not guilty, says Lord COKE, is a a good issue, if the defendant committed no trespass at all; but, by the common law, if he hath cause of justification or excuse, then can he not plead, not guilty, for then upon the evidence it shall be found against him, and upon that issue he cannot justify it, but he must plead the special matter, and confess and justify the battery. *Co. Lit.* 283, and we have no Statute allowing an officer to give the special matter in evidence on the general issue. It is most probable his Honor's attention was not called to the fact, that, not guilty, was the only plea, as both parties seem to have put the case upon the sufficiency of the process, as a *ca. sa.*; but as the error is apparent in the record, and is insisted on here, this Court must necessarily reverse the judgment and order a *venire de novo*.

PER CURIAM. Judgment reversed and *venire de novo* ordered.

THE STATE vs. THOMAS J. MILLER.

In this State the presumption is, that a black person is a slave.

An indictment for trading with a slave in the day time, by selling him spirituous liquor, must negative an *order* of the owner or manager, as well as a delivery for the owner.

But an indictment for selling spirituous liquor to a slave in the night time, need not contain such a negation, for the offence is complete, whether the slave had a written permission from his owner or not.

Upon conviction on an indictment, containing several counts, one of which is good and the others bad, judgment must be rendered for the State upon the good count.

Appeal from the Superior Court of Law, of Chowan County, at the Spring Term, 1847, his Honor Judge CALDWELL presiding.

This is an indictment for trading with a slave, and has two counts. The first charges, that the defendant in &c. on &c. "unlawfully did sell and deliver to a certain slave, whose name to the jurors is unknown and the property of some person to the jurors unknown, a pint of spirituous liquor, not being delivered for the use of the master, manager, or person having the control of said slave, contrary to the form, &c." The second count charges, that the defendant, "afterwards, to-wit, on the first day, &c. in the night, between the setting of the sun and the rising thereof, unlawfully did sell and deliver unto a certain negro slave, whose name to the jurors is unknown, and the property of some person to the jurors unknown, a pint of spirituous liquor, the said spirituous liquor not being delivered for the use of the master, overseer, or person having the management of said slave, contrary" &c.

On not guilty pleaded, the evidence was, that the prisoner, in the night time, sold and delivered spirituous liquor to a *negro*, but the witness did not know him, and could not say whether he was a slave or not. The counsel for the prisoner objected to the evidence being received, and insisted that it did not legally authorise a conviction. But the Court received it, and charged the jury, that it

was evidence, on which they might find the defendant guilty. After a verdict for the State, the defendant moved for a *venire de novo*, for error in receiving the evidence and in the instructions to the jury; and, that being denied, he moved in arrest of judgment, because the indictment does not aver that the liquor was not sold to the slave "*by the order* of the owner or person having the management" of the slave. The motion in arrest was over-ruled and the defendant appealed.

Attorney General, for the State.

A. Moore and *Heath*, for the defendant.

RUFFIN, C. J. Upon the question of evidence, and the presumption of the state of a negro from his color, the Court thinks the decision right. In *Scott* v. *Williams*, 1 Dev. 376, the Court said explicitly, that in this State there *must* be a presumption, that a *black* person is a slave. That is a presumption, not restricted to actions to try the right to freedom, as peculiarly applicable to them. It is a natural presumption arising out of the color, and the known fact that all persons of *black* complexion, or negroes, were originally slaves here; and therefore it is laid on one, who says such a person is not a slave, to prove it; and this extends to every case, in which the question, slave or not, arises.

The judgment cannot be arrested; because, although we think the objection well taken to one of the counts, we hold the other to be good. Taking all the provisions of the act together, the effect of it is, that on Sunday, and also in the night time, it is altogether unlawful to trade with a slave, even with the express permission or order in writing of the owner. It seems to have been the intention of the Legislature, that Sunday should not be desecrated by that species of traffic; it being probably considered also, that much of the mischief, in point of civil polity, from the trading of slaves, would be provided

against or avoided, by not allowing it on that day, when they are not so much in the service, or under the eye, of the owner. This latter motive led farther to the prohibition of traffic with them in the night time of any other day; it not being deemed safe to allow them under any pretence to trade between sun-set and sun-rise. The language and grammatical construction of the act, besides the mischief in view, make this the necessary construction. The first enacting clause of the section, *Rev. Stat. ch.* 34, *sec.* 75, contains a general prohibition in broad terms, from buying any one of certain enumerated articles from a slave; and then follows a like prohibition from selling and delivering to a slave any goods or articles of personal property. Then come two provisos: The first of which relates to buying any of those forbidden articles from a slave, and *allows* such buying "in the day time, viz. between the rising of the sun and the setting thereof," Sundays excepted, if the slave have the permission in writing of the owner, &c., to dispose of them. And the second relates to selling to a slave, and *also allows* "in the day time as aforesaid" the sale of any thing in exchange or payment for any articles, which the slave had written permission to sell. Both provisos are expressly restricted to the day time, and do not allow any trading with a slave, except in the day time. The trading with a slave, either in buying or selling, on Sunday or at any time but the day time, as defined in the act, is thus left to the general prohibitory enactment in the beginning of the section. As that enactment forbids all trading, without any qualification as to the owner's permission or any other whatever, and the provisos, which introduce such qualification, are expressly limited to "the day time," it follows when the indictment charges a trading in the night time, it takes the case out of the operation of the provisos altogether, and states a case in which the *corpus delicti*, as enacted by the act, is complete. There is nothing else to be added. Being in the

night time, it is no part of *that* offence, that it was done without the permission of the owner; for the permission, if given, would not prevent the act from being a crime, and therefore it need not be negatived. This conclusion is not affected by the exception in the second proviso—"always excepting spirituous liquors, fire arms, powder, shot, or lead, unless these articles be for the owner or employer of such slave, or by the order of the owner or person having the management of the same." From its nature as an exception, it only takes those articles out of the operation of the proviso, to which it is an exception; and therefore, the office of it here is, to regulate the sale and delivery of those articles in the day time, and it has no application to a sale of them in the night.

That exception, however, as we think, makes it necessary, in an indictment for selling or delivering spirits to a slave in the day time, to aver, that it was not *for* the owner, *or by his order*. The object of the exception is obvious, standing as an exception to the second proviso. That proviso does not require that the written permission of the owner should specify the articles *which may be sold* to a slave; but it allows "any goods" to be sold to him in exchange or payment for any of the articles, which the owner's permission (as mentioned in the preceding proviso) authorised the slave to sell in the day time. The office of the exception was, in respect to the articles mentioned in it, to qualify that general permission to sell "any goods," by making it necessary, not only that the owner's permission should specify what the negro might sell, but also that it should be specified, that he might purchase or take in exchange these articles, to-wit: spirits, fire arms, &c. The meaning, then, is, that there must be an express direction or written order of the owner or manager for these articles, as the only justification for letting a slave have them in the day time. But with such an order they may be sold to the slave or delivered for the owner in the day. The question then is, further,

whether an indictment for such a sale must negative the delivery for the owner, and the written order of the owner or person having the management of the slave. We think, it must. It is true, there is a distinction between an exception in the enacting clause, and a separate proviso; the rule being, that the former must be negatived, and that the latter need not, but is matter of defence. *Steel v. Smith*, 1 Bam. & Ald. 95. And it may possibly be, that as to purchases from slaves in the day, an indictment need not charge more than the buying of a prohibited article, which would be *prima facie* unlawful, leaving to the defendant to shew the authority. However that may be, and we give no opinion on it, we think an indictment for selling these particular articles in the day time must negative the excuse, allowed by the exception for such a sale. The frame of the act is peculiar. What is said about spirituous liquors, fire arms, &c. is, in itself an important enactment also, in so far as it requires that, as to those articles, there should be a written permission, not only that the slave might sell the things for which these things were given, but also that the writing should expressly authorise the sale to the slave of these particular articles or their delivery to him for the owner. It amounts to an express prohibition against the sale of these articles, by name, *unless* the slave be permitted in writing to buy *them* or to take *them* for his owner. As to them, the exception, "unless &c." is so mixed up with the description of the offence, and in the same sentence that the one cannot be read without the other; and therefore according to the general rule, the description must bring the case within both the affirmative and negative words of the enactment. Here, that has not been done. The first count does not charge the sale to have been in the night, and we cannot assume that fact, without an allegation of it. As an indictment for selling in the day, it is defective because it does not negative *an order* of the owner or manager, as well as a delivery *for* the owner,

But as one of the counts is good and the judgment is such as may lawfully be given on that, it cannot be declared erroneous, as has long been settled.

PER CURIAM. Judgment affirmed.

JAMES BEALE *vs.* MARIOT ROBERSON & AL.

In an action for malicious prosecution, where probable cause is alleged, it is the duty of the Court to direct the jury, that, if they find certain facts from the evidence, or draw from them certain other inferences of fact there is or is not probable case; thus leaving the questions of fact to the jury, and keeping their effect, in point of reason, for the decision of the Court as a matter of law.

The cases of *Leggett* v. *Blount*, No. Ca. Term Rep 123, *Plummer* v. *Green*, 3 Hawks 66, *Cabiness* v. *Martin*, 3 Dev. 454, and *Swaim* v. *Stafford*, 4 Ired. 392 and 398, cited and approved.

Appeal from the Superior Court of Law of Chatham County, at the Spring Term, 1847, his Honor Judge MANLY presiding.

The plaintiff sued the defendants for having maliciously and falsely sued out a warrant, and prosecuted him, with two other persons, before a Justice of the Peace, for a felonious assault and robbery of the defendant Roberson on the high-way. Upon not guilty pleaded, the evidence was, that on a certain day, Roberson and the plaintiff, and the two other persons, who were prosecuted with the plaintiff, were in the town of Pittsborough together, and, that in the afternoon, Roberson, who was in a state of intoxication, set out on horseback for his residence, which was in the country in that

vicinity: Afterwards, but how long did not distinctly appear, the witnesses saying, about an hour or more, the plaintiff and the two other persons, likewise left Pittsborough together, to return, as they said, to their respective homes. The road, which led to the residences of Roberson, and the plaintiff and his companions, was the same for two miles and a half from Pittsborough, but at this distance there was a fork, and the road on one hand was Roberson's, and that on the other, of the other persons. When the plaintiff and the two others were on trial before the Justice of the Peace, Roberson was sworn and examined as a witness to support the prosecution. And on this trial, after the plaintiff had given in evidence, the acquittal and discharge of himself and the others by the Magistrate, the defendants, for the purpose of showing probable cause, gave in evidence the examination of Roberson, before the Magistrate, in which he stated, that he proceeded on his return home, to the fork, and then took his own branch of the road and had gone half a mile on it, when he was overtaken by persons on horseback, and that he turned his face around to see who they were, and discovered that they were three in number, and that two of them rode horses of the same color with that of the horses of two of the persons accused, but did not observe the color of the other horse; and that, as he turned, and before he recognised either of the persons, who had come up, he was knocked from his horse by a violent blow across the head with a stick: and being then interrogated by the accused, whether he knew or believed that they had stricken him, the said Roberson replied, that he had no right to say they did; for he did not see them, and could not, indeed, say, whether the persons were white or black. And the defendants gave further evidence, that a short time after the blow was given to Roberson, as fixed by him in his examination, the three accused persons crossed Rocky River, in company, a mile or two farther on their way.

Upon the foregoing evidence, the presiding Judge directed the jury, "that it was essential to the defendants' justification, that they should have had probable cause for deeming the plaintiff guilty, and taking legal proceedings against him." And his Honor further stated to the jury, "that it was not easy to define in precise terms, what probable cause was; but that he believed it to be such cause for proceeding as would have actuated a rational mind, imbued with ordinary respect to the rights of others: and should the jury conclude, in making an application of the facts proved, that the evidence before the minds of the defendants furnished them, at the time, with reasonable grounds of suspicion and for suing out the warrant, the plaintiff could not recover." And his Honor further stated to the jury, "that if the defendants knew or believed, that the plaintiff was innocent, they would then have no cause for what they did; yet, on the other hand, that it was not inconsistent with probable cause, though there was at the time no certain belief or settled conviction, in the minds of the defendants', of the plaintiff's guilt."

The counsel for the plaintiff insisted, that the Court was bound to inform the jury, as a matter of law, whether the facts given in evidence, or any of them, and, which did, or did not, amount to probable cause, and prayed the Court to direct the jury, that the evidence in this case, if believed by them, did not amount to probable cause. But his Honor declined giving any further directions, and the jury gave a verdict for the defendants; and from the judgment the plaintiff appealed.

Badger and *McRae*, for the plaintiff.
Manly, for the defendant.

Ruffin, C. J. This case brings up again the question, whether probable cause is matter of law, so as to make it the duty of the Court to direct the jury, that, if they

find certain facts upon the evidence, or draw from them certain other inferences of fact, there is or is not probable cause; thus leaving the questions of fact to the jury, and keeping their effect, in point of reason, for the decision of the Court, as a matter of law. Upon that question, the opinion of all the Court is in the affirmative; and therefore this judgment must be reversed.

The point is concluded in this State by repeated adjudications. It was first presented in the case of *Leggett* v. *Blount*, N. C. Term, R. 123, in which the Judge told the jury, after the examination of many witnesses on both sides touching the alleged probable cause, that there was probable cause; and the judgment was reversed, because the Judge had assumed the decision of the whole case, including the facts, as well as the law. But it was distinctly admitted, or rather affirmed, there, that *probable cause*, as an abstract question, is one of law and to be decided by the Judge, according to the doctrine in *Johnston* v. *Sutton*, 1 T. R. 510, and the authorities therein cited; which establish, that upon a special plea and demurrer, or a special verdict, the Court determines that question, and that, even when there is a general verdict for the plaintiff, it is the province of the Court to say, whether certain facts, appearing on the declaration, do not amount to probable cause. In the subsequent case of *Plummer* v. *Gheen*, 3 Hawks 66, Chief Justice TAYLOR (who had tried the case of *Leggett* v. *Blount*,) delivered the opinion of this Court, and admitted that the Superior Court had explained to the jury correctly, what probable cause was, but yet held, that it was a question of law, whether the circumstances, being true, amounted to probable cause, and that the parties had a right to the opinion of the Court, distinctly on it; and the judgment was reversed, because upon very complicated and contradictory evidence, the presiding Judge had left that question to the jury. In *Cabiness* v. *Martin*, 3 Dev. 454, the presiding Judge decided the question of probable cause, and this

Court reversed the judgment, not because he assumed what was not within his province, but because he had decided wrong, as we thought, by holding a certain fact, if found by the jury, to be probable cause, which we deemed not to be so. And, in the two cases of *Swaim* v. *Stafford*, 4 Ire. 392 & 398, the question was again decided as matter of law—it being held, in the one case, that there was, and in the other, that there was not, probable cause. Such a series of decisions, in our own Courts, the same way, would protect the doctrine laid down in them from being drawn into debate now, even if we entertained doubts of its correctness originally. But, independent of authority, our reflections satisfy us, that the principle is perfectly sound. It is a question of reason, whether certain ascertained facts and circumstances, constitute a probable and rational ground for charging a particular person with a crime. If, indeed, the question was, what was the actual belief of the prosecutor, respecting the other's guilt, it would be purely one of fact, and proper for the jury exclusively, as that of malice is. But that is not the question in such cases. It is true, indeed, as his Honor told the jury in this case, if a prosecutor knows the person, whom he accuses, to be innocent, or does not believe the apparent circumstances of suspicion against him, that then *he* has no probable cause for prosecuting, however other persons, not knowing or believing as he did respecting the evidence, might justly entertain suspicions of the party's guilt. But while a prosecutor's belief of the innocence of the person charged may deprive the former of the pretence of probable cause, it does not follow, *e converso*, that the prosecutor's belief of the other's guilt shall excuse him; for he must take care, that he acts only on a *reasonable* belief, a *just* suspicion; in other words, that he had, under the circumstances in which he was placed, as found in fact by the jury, a probable cause to think the party guilty, so that he might fairly and honestly call him to answer the charge. It is not, there-

fore, what a prosecutor believed, but what *he ought* to have believed, that justifies. If he has not the capacity to weigh the circumstances justly, or finds his dispositions towards a suspected person interfering with the coolness of his deliberations, and the impartiality of his conclusions, it is his plain duty to consult those, whose passions are not heated, and whose knowledge will enable them to judge more correctly, and not at once rashly to accuse an innocent person upon insufficient grounds. Now, our enquiry is, whether, for the determination of the question, as to the sufficiency or the insufficiency of the grounds of suspicion, supposing them to exist in fact, the Court or the jury be the more competent; and we think, very clearly, that the Court is, because it is a question of general and legal reasoning, and can best be performed by those, whose professional province and habit it is, to discuss, weigh, and decide on legal presumptions. The only argument against that is, the difficulty in cases of many and complicated facts, and contradictory evidence, as in *Plummer* v. *Gheen*, of properly separating to the comprehension of the jury, and to the satisfaction of the Judge, the matters of law and fact. But that only proves the difficulty of deciding such cases, whether by the Court or jury, and does not at all help us in saying, whether this or that point should be decided by the one or the other. But, as was said by counsel in the case of *Panton* v. *Williams*, 2 Adolph. and Ellis, N. S. 169, however great that difficulty may be, it is one which a Judge can deal with better than a jury; as he does with reasonable time, due diligence, and legal provocation and the like; and in the case just referred to, which was cited by the plaintiff's counsel, the point now under consideration was, after elaborate discussion, decided in the *Exchequer Chamber*, upon a writ of error to the *Queen's Bench*. The Court held, unanimously, that in an action of this sort, if the defendant sets up facts, as showing probable cause, the Judge must determine,

whether the facts, if proved, or any of them, constitute such cause—leaving it to the jury to decide only, whether the facts, or those inferred from them, exist; and as that is so, when the facts are few and the case simple, it cannot be otherwise, when the facts are numerous and complicated. It would seem then, that making a question on this subject must be regarded as an attempt to move fixed things, and cannot be successful either in England or here.

As the case goes back to another trial, on which the facts may appear differently, we think it unnecessary to consider those, that came out on the former trial, in reference to the question of probable cause, further than to remark, that few cases, perhaps, could better illustrate the danger of leaving that question to the discretion of a jury, whose decision of it is not susceptible of review in another Court.

PER CURIAM. Judgment reversed, and a *venire de novo*.

ROBERT G. RANKIN *vs.* ALEXANDER MATTHEWS.

What is stated by an auctioneer in his advertisement may be explained by what is said by him at the time of the sale.

Appeal from the Superior Court of Law of New Hanover, at the Special Term in January, 1847, his Honor Judge MANLY, presiding.

This was an action to recover the price of certain goods, sold at auction in the town of Wilmington, in pursuance of the annexed advertisement.

AUCTION.

On Thursday morning at 9 o'clock, I will sell at the Store of Mr. Robert Simpson, his stock in trade, consisting of Molasses, Coffee, Sugar, Soap, Crockery, and a general assortment of Groceries.

R. G. RANKIN,
Auctioneer.

June 24th, 1844.

PLEA—A SET OFF.

The facts were, that the goods mentioned had constituted the stock in trade of a merchant by the name of Robert Simpson, and were sold by the plaintiff, an auctioneer in the town of Wilmington, at the store house, which had been occupied by Simpson. Some weeks, however, prior to the sale, the goods were conveyed by Robert Simpson to Miles Costin, to be by him sold and applied to the payment of a debt, upon which he the said Miles Costin was surety. The goods were taken possession of by Costin, he keeping the key of the store from the time of the conveyance, until it was delivered to the auctioneer, Rankin, with instructions to sell for his, said Costin's, benefit.

The defendant proved a debt due to him from Simpson of a greater amount than the one sued upon.

The Court instructed the jury, that to entitle the defendant to his set off, it should be established by him, that the goods were represented and sold by the auctioneer as the goods of Simpson; and the evidence upon this point (including the advertisement) was left to the jury.

The jury returned a verdict upon the issue in favor of the plaintiff.

The defendant had a rule for a new trial, and supported it upon the ground, that the Court ought to have instructed the jury, that the advertisement was sufficient

of itself, and conclusive upon the auctioneer, as to the property of the goods, so as to let in the set off. The Court thought otherwise and discharged the rule.

Judgment for the plaintiff and appeal by the defendant.

Iredell, for the plaintiff.
D. Reid, for the defendant.

Daniel, J. The Court charged the jury, that the defendant was entitled to his set off, if he established, that the goods were represented and sold by the auctioneer, as the goods of Simpson. And the evidence upon that point, including the advertisement of the auctioneer, was left to the jury; and they found the issue against the defendant. The defendant insisted, that the advertisement concluded the plaintiff to deny, that the goods when sold, did not belong to Simpson; as he stated, in the said advertisement, that they were, "his *stock in trade*." We think with his Honor, that what was said in the advertisement by the auctioneer might be explained, by what was said by him at the time of the sale. All the evidence went to the jury, and they have negatived, that the goods were sold as the property of Simpson. We think the Judge acted right, in receiving other evidence besides the advertisement, and then leaving it all to the jury, upon the question, whether the plaintiff sold the goods as the property of Simpson. In England, by Statute, the auctioneer is obliged to send to the excise officer a copy of his advertisement, and an appraised schedule of the property offered for sale, with the names of the owners. All this is intended to check the auctioneer in accounting for the auction taxes. But these regulations are not in force here; and the rules there established, for the better collection of the revenue, are no part of our law.

We think, that the judgment must be affirmed.

Per Curiam. Judgment affirmed.

THE STATE TO THE USE OF W. R. LEE & AL. vs. WILLIAM H. WATSON & AL.

A was appointed a guardian to certain infants at February Term, 1833, of the County Court, and so continued until May Term, 1841. During this time he never renewed his bonds as required by law. The first renewal should have been at February 1836 and the second at February 1839. In August 1837, W. W. was appointed Clerk and issued no notice to the Guardian to renew his bonds; *Held*, that the Clerk and his sureties were responsible for this neglect and were bound to make compensation to the orphans for any loss they sustained thereby.

RUFFIN, C. J. *dissentiente.*

Appeal from the Superior Court of Law of Johnston County, at the Fall Term, 1846, his Honor Judge SETTLE presiding.

This is an action of debt, upon the official bond of the defendant, Watson, brought against him and his sureties.

The case is as follows: At the February term, 1833, of Johnston County Court, Nathan T. Allen was appointed guardian of the relators, and so continued until February term, 1841, of said Court, when he was removed, and William R. Lee was appointed. The guardian bond of Allen never was renewed, nor did any notice ever issue to compel him to do so. At the time of his appointment, Ransom Sanders was the Clerk of the Court, and held his office until the August term, 1837, when the present defendant, Watson, was appointed and gave bond according to law, which was renewed at the August term, 1838, with the other defendants, his sureties. At February term, 1839, Allen and his sureties were solvent; they have, since, become entirely insolvent. The relators, by their present guardian, brought suit against Allen and his sureties, and recovered judgment for the sum of $1,500, as the amount of what was due to them from Allen, as their guardian. The execution, issued upon this judgment, has been returned by the sheriff, *nulla*

bona. The action is brought on the bond executed by the defendants, at August term, 1838, and the breach assigned is, the failure of Watson, the defendant, to issue to Allen a notice, from February term, 1839, to the May term succeeding. It is admitted, that the defendant did not in fact know, that Allen had not renewed his bonds, nor did the records of the Court show it in any other way than by their entire silence on the subject. There was a verdict for the defendants and an appeal by the plaintiffs.

J. H. Bryan, *Busbee*, and *Iredell*, for the plaintiffs.
W. H. Haywood, and *H. W. Miller*, for the defendants.

Nash, J. Upon the trial below, his Honor, the presiding Judge, gave judgment, *pro forma*, against the plaintiffs. In this opinion, I do not concur, but believe that the plaintiffs were entitled to a judgment, to the full amount of the injury sustained by them, in consequence of the failure of the Clerk, the defendant, Watson, to issue a notice to Allen, as assigned in the declaration.

The bond, on which the action is brought, is in the form usual to such instruments, and concludes with the following covenant, "and in all things do and execute the several duties of said office, as required by law." Did the *law* make it the duty of Watson, as Clerk of the Court, to issue the notice to Allen, as set forth in the case, and have the plaintiffs been injured by his failure so to do? To my mind it is perfectly clear, that it was his duty, *ex officio*, to issue the notice, and that, not to do it, was a breach of his bond. The Legislature of our State has exhibited a praiseworthy anxiety to guard the interest of orphans. From the year 1762, to the year 1825, they have enacted many laws with that view. To save the expensive, and often tedious, applications to a Court of Equity, by the Act of 1762, ch. 69, they gave to the Superior and County Courts the care of orphans, and their estates, in their respective counties, making it their

duty to appoint guardians, and take from them bond with good and sufficient sureties. And to ensure a vigilant and faithful discharge of this duty, the Magistrates, who are on the bench, when the appointment is made and the bond taken, are, themselves, constituted sureties of the guardian, if they fail to take such sureties as are good at the time. And, in order that the orphan may be at no loss to know to whom to look for indemnity in such a case, by the Act of 1825, ch. 18, sec. 2, it is made the duty of the Clerk of the Court, "to make a record of, and enter at large upon their docket, and endorse upon the guardian bond, the names of the Justices, present in Court, and granting the guardianship," &c. By the 15th section of the Act of 1762, the County Court is required to hold an orphan's Court annually, to which all guardians are required to return their accounts and have them settled; and the Act of 1816 makes it the duty of the Clerk, *ex officio*, to issue notices to all guardians to make such returns. By the 4th. 9th and 16th sections of the Act of 1762, it is made the duty of the several Courts to remove any guardian, by them appointed, who is abusing his trust, "or where such guardian or his sureties are likely to become insolvent," and "to make such order for securing the estate of the ward, as they shall think fit and proper." In the year 1820, ch. 5, for greater security of the estates of orphans, the Legislature provides, that all guardians shall renew their bonds every three years from the date of their respective appointments. And by the 2nd section, it is made the duty of the Clerk of each Court, to issue a notice, in the nature of a *scieri facias*, against each guardian, failing so to do. By this Act, two evils were inflicted upon those, whose interest it was intended to subserve; the one was, that no *sci. fa.* issued without an order of the Court, and the second was, that much expense was incurred. To remedy them, another Act was passed in 1824, ch. 16, which provides that, instead of the *scieri facias*, required by the Act of 1820, "the

Clerks be required, to issue an *ex officio* summons. This is a succinct history, in part of the legislation of this State, upon this important and interesting subject. The object of the Legislature cannot be mistaken; it is to protect those, so helpless in themselves, and so needing protection; and if these laws are duly enforced, it can scarcely be, but that the estates of orphans will be secured. The question in this case arises under the Act of 1824. The phraseology is certainly awkward—the Clerk is required to issue an *ex officio* summons; the meaning is too obvious to excite any doubt; it is, that the Clerk shall, *ex officio*, issue a summons. By the Act of 1820, it is made the duty of the Clerk to issue a *sci. fa.* and the practice under it was, that no *sci. fa.* issued without an order of Court. The consequence was, that it very rarely issued at all, for the want of some person to move in the matter. To remove this difficulty, it was made the official duty of the Clerk to issue the notice. If it be his official duty, then, unquestionably, the omission on his part to issue the notice, is a breach of his bond. But it has been urged here, that the records of the County Court of Johnston, when the defendant Watson, was appointed Clerk, did not show that Allen had not renewed his bonds, and that he, Watson, was ignorant of the fact, and that no request was, at any time, made to him, to issue a notice, nor did the Court make any order to that effect. This may be all true, and doubtless is so, but it does not, in my estimation, form any justification for Watson, or, in other words, prevent a breach of his bond. There was no necessity for a request, or order of Court, for it was his duty, as Clerk and by virtue of his office, to issue it. If he was ignorant of the fact, as alleged, it was a culpable ignorance, which cannot, and ought not, in my opinion, to protect him. Allen's bond was renewable at February term 1836, and at February term 1839. Watson was appointed Clerk at August term 1837, and then took possession of the records. They told him when Allen was

appointed, and of course when his bond was renewable, and did not shew that it ever had been renewed.

It is asked, how far back was it the duty of the Clerk to examine the records, to find out who were defaulting guardians. The question is not without its difficulties, and I would not undertake to lay down any rule upon the subject, if any can be. In my opinion, it is not necessary to say more upon this point, than that, here, the time is too short. But eighteen months elapsed from the period when Allen ought first to have renewed his bond, to-wit, February term, 1836, and the time when Watson was appointed Clerk, to-wit, August term, 1839. And in 1839, when it ought, I presume, again to have been renewed, Watson was the Clerk of the Court.

It is no answer to the claim of the plaintiffs, that Allen's first failure was while Sanders was the Clerk of the Court, and that his failure to issue the notice gave them a right of action against him and his sureties. This is certainly so, but it does not relieve the defendants from their liability for a breach of their bond, by a like failure on the part of Watson.

It is asked what damages are the plaintiffs entitled to, and by what rule are they to be ascertained? My answer is, the plaintiffs are entitled to damages to the amount of the injury sustained by them, from the failure in the performance of official duty by the defendant, Watson, and that in this case, a rule has been resorted to, which is satisfactory to my mind, to-wit, the ability of the guardian, Allen, to pay to the plaintiffs what he owed them at the time the notice ought to have been issued by Watson, and, his, now, entire inability. In August 1837, when Watson was appointed Clerk, Allen and his sureties, were solvent, and so continued up to February term, 1839; that is, Allen had property sufficient to pay all his debts, and, of course, what he owed the plaintiffs. Had the defendant, Watson, issued the notice to Allen, from February term to May term, 1839,

during which period Allen and his sureties were solvent, the Court might, and doubtless would, have taken the necessary steps to secure the estate of his wards, either by compelling him to renew his bonds, and give new and sufficient sureties, or by taking such other steps as they might have deemed necessary.

Believing, then, that it was the duty of the defendant, Watson, *ex officio*, to have issued the notice to the guardian, Allen, I am constrained to say, in the language of his official bond, that he has not "done and executed the several duties of his office as required by law," and that the plaintiffs have a right to be compensated in damages, to the full amount of the injury they have sustained by his delinquency.

In my opinion, the judgment of non-suit was erroneous, and there ought to be a *venire de novo*.

DANIEL, J. Watson was the Clerk of the County Court of Johnston, and he and his sureties are sued on his official bond, given, on the 28th day of August, in the year 1838. The condition in the bond alleged to be broken, is as follows: "And that he (the said William W. Watson) would in all things do and execute, the several duties of said office (of Clerk) as required by law." The breach, assigned upon this condition in the bond, was, that Watson had not *ex officio*, issued a notice, agreeably to an Act of Assembly to one Allen, the then guardian of the relators, for him the said Allen, to come into Court and renew his guardian bonds; he, the said Allen, having been appointed by the County Court of Johnston, guardian to the relators in the year 1833, and still continuing their guardian. He had not renewed his guardian bond, as the law directs, for three years next before the 20th day of February 1839; whereby the plaintiffs complain, that they have been damaged, &c. The Judge non-suited the plaintiffs, and they appealed.

We think that the non-suit was improper. The Clerk was bound by law to take notice, that the guardian Allen had not renewed his guardian bond in the time prescribed by law. And it was, then, one of the duties of his office (*ex officio*) to have issued a *scieri facias* to him, Allen, to come into Court and renew his bond, according to the requirements of the Act of Assembly. He did not issue the notice, and it seems to us, that the aforesaid condition in his official bond was broken; and that the plaintiffs were entitled to recover nominal damages at least. But before the damages could be further increased by the jury, it would have behooved the plaintiffs to shew to their satisfaction, that, if the notice had been issued, returnable to November term 1838, or to February term 1839, the guardian was then able, and would have given the additional sureties required by law; or that the Court would then have removed him, on his failure to give such additional surety, and would have appointed another guardian, who would have recovered the whole demand of Allen and his sureties, before their failure; or would have recovered something, out of the wreck of the estates of Allen and his sureties. The verdict of the jury must, of course, be regulated by such proofs, as the plaintiffs can make upon the questions aforementioned. And if the jury should be of opinion, that Allen would not, or could not, have given additional surety for his guardianship, or that nothing could have been realized by a new guardian, out of the estates of him and his sureties, if notice had been duly given him by the Clerk, returnable either to November term 1838, or February term 1839, then nominal damages only should be their verdict. The whole debt, due the plaintiffs from Allen, or a part of the same, or a nominal sum, must be the measure of the damages to be assessed by the jury, according as the proofs of the plaintiffs' loss may appear to have arisen from the negligence of the Clerk, or not.

We think, that there must be a new trial.

Per Curiam. Judgment reversed and *venire de novo* awarded.

STATE ON THE RELATION OF JOHN A. PARKER *vs.* ROBERT W. WOODSIDE & AL.

A Sheriff, to whom a writ has been delivered, but who goes out of office before the return day of the writ, has no power to make the return on it, and therefore is not liable to amercement for not doing so.

It is the duty of the Sheriff, going out of office, to deliver all the process remaining in his hands, to his successor.

A judgment of an amercement against a sheriff is not conclusive against the sureties on his bond. They may show that the judgment was either fraudulently or improperly obtained against their principal.

The case of *McLin* v. *Hardie*, 3 Ired. 407, cited and approved.

Appeal from the Superior Court of Law of New Hanover County, at the Special Term in January 1847, his Honor Judge Manly presiding.

This was an action of debt on the official bond of the defendant, R. W. Woodside, as Sheriff of Brunswick County, to recover against him and his sureties the amount of an amercement, for which judgment *nisi* was obtained against said Woodside at September term 1844, of New Hanover County Court, and which was made absolute at December term 1844, of said Court.

The said bond bore date on the 5th day of September 1843, and expired on the 5th day of September 1844, being the last of several official terms of said Sheriff; and it was proved and admitted, that an execution had been placed in the hands of the said Woodside, Sheriff as afore-

said, tested of June term 1844, of New Hanover County Court, and returnable to the September term of said Court; and it was further proved that some time in the month of August 1844, the Sheriff acknowledged, that he held the said execution, and had levied upon a tract of land belonging to the defendant in said execution; that the said Sheriff had failed to return the said execution to September term 1844, of New Hanover County Court; that the said term commenced on the 12th day of September 1844, and that the amercement against the Sheriff had been obtained for failing to return the said execution.

On these facts it was contended, that the defendants were not liable, inasmuch as no proceeding to amerce the Sheriff had taken place until the 12th day of September 1844, seven days after the expiration of his official year, and that, admitting the plaintiff to be at liberty to go behind the judgment of amercement to shew, that, although the amercement had been rendered after the expiration of the sheriff's official term, it had been for a particular default, yet that would not help the plaintiff, because the default, for which he had been amerced, had also occurred after the expiration of his official year. The plaintiff insisted, that the judgment and amercement were conclusive against the Sheriff and his sureties, and definitively fixed their liability. A verdict was taken for the plaintiff, with leave to the defendants, notwithstanding the verdict, to move that the plaintiff be non-suited, should the Court be of opinion that on the facts the plaintiff is not in law entitled to recover; and the Court being of this opinion, a non-suit was accordingly entered and the plaintiff appealed.

W. H. Haywood, for the plaintiff.
Strange, for the defendants.

Daniel, J. The execution, which the relator placed in the hands of Woodside, commanded the sheriff to re-

turn it, and what he had done under it, to the next term of the Court out of which it had issued. And the Act of Assembly subjected the sheriff to a penalty of $100, in case he neglected to return the writ. The Act, being penal, must be construed strictly. Woodside was not sheriff, at the time the execution was returnable; he, by law, therefore, could not return the said writ into Court. The new sheriff or coroner, as the case might be, was the proper person to return the writ. It was the duty of Woodside, however, to turn over, or surrender to the new sheriff or coroner, all the writs in his hands, to be returned to the ensuing term by the new officer. If the plaintiff in this execution has been injured by the old sheriff neglecting to do his duty, he has his remedy by an action on the case against him; but he is not entitled to the penalty of $100. The plaintiff insists, that the defendants are concluded by the judgment against Woodside for the $100. We do not think so; the sureties of the sheriff may shew, that the judgment was either fraudulently or improperly obtained against their principal. It seems to us, however, that the case of *McLin* v. *Hardie*, 3 Ired. 407, runs nearly upon all fours with this case, and is decisive of it. It was then held, that a sheriff, to whom a writ had been delivered, but who went out of office before the return day of the writ, had no power to make the return on it, and therefore was not subject to an amercement for not doing so. Without over-ruling this case, (which we do not feel disposed to do,) we are bound to affirm the judgment, which is done accordingly.

PER CURIAM. Judgment affirmed.

THE STATE *vs.* JOHN BARFIELD.

Where, on the trial of an indictment for murder, the prisoner proved a sufficient legal provocation at the time to extenuate the homicide, it is not competent to prove, in order to shew that the killing was not on the immediate provocation but from previous malice, that the prisoner, a year or a month previously, had declared his intention to kill two or three men, it being admitted that the prisoner had no reference in such threats to the deceased, as one of those men.

Appeal from the Superior Court of Law of Cumberland County at the Spring Term 1847, his Honor Judge BATTLE, presiding.

The prisoner was indicted for the murder of Alfred Flowers. In opening the case for the State, the Solicitor stated, that he expected to prove from antecedent threats, as well as from the circumstances attendant upon the killing, that it was done with malice express, or, if he failed in that proof, he expected to show that the homicide was committed under circumstances, from which the law would imply malice.

He then called *Samuel Flowers*, the father of the deceased, who testified that he was sent for, and went to the house of his son, about nine o'clock on the night he was killed—that when he arrived he found his son dead—that his deceased son's wife, seemed greatly distressed, when she met him, and the prisoner mocked the cries, which she made in weeping—that he saw some person uncover the corpse of his son, when the prisoner, who was present, remarked, that he had laid him cold.

Mrs. Flowers, the widow of the deceased, was then introduced. She stated that the prisoner came to her husband's house about one o'clock of the day, on which the homicide was committed, that he and her husband appeared to be friendly, and her husband invited him to drink—that shortly afterwards, a quarrel arose between them, in consequence of some offensive language used by the prisoner, and after a short time, she heard her hus-

band complain to the prisoner, that he had cut his pantaloons, and the witness said the pantaloons were cut, but she did not see by whom, or how it was done—that the parties then appeared to become friendly, and continued to drink together, until her husband became very drunk, and the prisoner excited by liquor, but not drunk—that the prisoner and her husband were connected by the marriage of the former with an Aunt of the latter, and that the latter frequently called him Uncle Jack—that towards night, another quarrel arose between them, and her husband went out of doors, when the prisoner shut the door upon him, and refused to let him come in—but upon her husband's getting a pestle to beat down the door, and her interposition, the door was opened—that her husband then took a chair and sat down, and told the prisoner that he had come there uninvited, and he might take the road and go home—that the prisoner then commenced giving the damned lie, to every thing said by her husband or herself—that her husband arose from his chair, saying, he could not stand it, and, as he did so, the prisoner came towards him with his knife drawn, and thrusting it at him—that her husband, thereupon, raised his chair and pitched it over the prisoner's head. without intending, as she thought, to strike him—that in the effort to throw the chair, her husband staggered and fell, upon which the prisoner instantly rushed upon him, and gave him several stabs while he was down—that she assisted him to rise and he went towards the door, where the prisoner followed, and stabbed him once or twice more on the back—that she then assisted him to the bed, upon which he laid down, and soon after died; she also testified to the fact of the prisoner's mocking her, and saying, that he had laid Alfred cold.

Dr. Hicks was then introduced and testified, that he was called to see the deceased about nine o'clock of the night when he was killed—that when he arrived, he

found that he had been dead some time—that he examined the fore-part of his body, and found three wounds, one on his neck, another near the pit of the stomach, and a third on the breast; the two first of which were slight, and the last, deep and calculated to produce death, and that it appeared to have been inflicted with a dirk knife. This witness, testified further, that the deceased was a low, corpulent, strong made, athletic man, about forty years of age, and that, when he arrived at the house of the deceased, the prisoner appeared to have been drinking, but was not drunk.

The counsel for the State here announced, that they had closed their testimony, and would introduce no other witness, unless it became necessary to do so, in consequence of the testimony introduced in the defence.

The counsel for the prisoner, then called two witnesses, to prove, that Mrs. Flowers had given a different account of the transaction, when examined before the jury of inquest. One of these witnesses, who acted as coroner, testified, that on her examination before the jury of inquest, Mrs. Flowers said, that when she saw the chair raised, and the knife drawn, she became alarmed, and turned and went towards the door, and presently she heard a noise, as if something had happened, and, turning around, discovered her husband going towards the bed, on which he fell, and soon expired. They stated, upon cross-examination, that when Mrs. Flowers was sworn to give testimony before the jury of inquest, she appeared to be greatly distressed, and very few questions were put to her. And they both testified that she had always borne a good character, and they would believe her when examined upon oath.

Another witness, *Theophilus Barfield*, a brother of the prisoner, was then called, and testified, that Mrs. Flowers stated to him, that she did not see her husband killed, having gone out of doors, when she saw her husband raise the chair.

The prisoner's counsel then introduced as witnesses, *John* and *Robert Flowers*, sons of the deceased, who attended the trial, as witnesses for the State. Robert Flowers, the elder of the two, a lad, sixteen or seventeen years old, testified, that he was not at home, until late in the afternoon of the day, when the prisoner came to his father's house; that, when he went into the house, he saw the prisoner sitting on a table with a gun in his hand; that he demanded the gun of the prisoner, who immediately delivered it to him: that he then went out of doors, and when he came back, he found the prisoner lying on a bed; that his father sent him to draw some liquor, and when he returned, he found his father sitting in a chair near the door; that the prisoner came towards his father, when his father arose from his chair, took it up, and threw it towards the prisoner, and it passed a little above his head without touching him, (and he believed his father intended to throw it over his head without striking him,) and in doing so, he staggered and fell, when the prisoner rushed upon him, and stabbed him; that he did not see the prisoner have any knife in his hand, when he first came towards him, and he saw the prisoner draw it from his pocket at or about the time, when his father raised the chair, and the prisoner rushed upon his father instantly that the chair was thrown; that immediately after his father was stabbed, he got up and went towards the door, and the prisoner followed and stabbed him again, and his father then went to the bed and laid down, and soon afterwards died; that he did not see his mother assist his father either to get up from the floor, or to carry him to the bed, and thought, if she had done so, he would have seen it. He testified further, upon cross-examination, that after his father was dead, he went into the yard where the prisoner then was, and asked him why he had killed his father, to which the prisoner replied, that if he did not clear out, he should send him off with cut throat.

The prisoner's counsel then called some witnesses who deposed to the good character of Theophilus Barfield for integrity and veracity, and closed their case.

The counsel for the State, then introduced James Manly, who testified, that about a year previous to this transaction, he saw the prisoner have a pocket knife; that upon prisoner's showing it to him, he told prisoner that he ought not to carry it into company, upon which the prisoner replied, that there were two men, whom he intended to kill, and that he would be damned if he would not do it, if he had to be hung for it the next day.

Allen Manly, another witness for the State, testified, that about the Christmas before the killing, which was on the last day of January 1846, he was at the house of the prisoner, who told him, that he had a very pretty knife, which he wished to show him, that he went into a room to get it, but soon returned, saying, that he could not find it, and he expected that his son had taken it off, and he said further, that he had gotten the knife for two or three men. Other witnesses were then called, who stated that they were at the house of the deceased after he was dead, on the night he was killed, and heard the prisoner say repeatedly, that he had laid Alfred cold, and that he manifested indifference to his death. One of these witnesses testified, that before this transaction, the prisoner and the deceased appeared to be friendly, and that the deceased was a cowardly man, but violent when drunk.

It was proved by several witnesses, that the prisoner and the deceased lived within a short distance of one another, were upon terms of intimacy, and in the habit of exchanging frequent friendly visits, and there was no evidence of any disagreement or ill feeling between them at any time. Some other testimony was given, which it is unnecessary to State.

The prisoner's counsel admitted, that if the testimony of Mrs. Flowers were to be taken as true, the prisoner was guilty of murder, but they urged upon various grounds

that she was not to be believed, and they insisted, that the account of the transaction given by Robert Flowers was the true one, and, if it were, then they contended that the throwing of the chair, by the deceased, at the prisoner, was legal provocation, that the homicide was prompted by the provocation, and the prisoner's offence was thereby mitigated to man-slaughter. They contended, further, that at the time the deceased rose up from his chair, he and the prisoner were upon friendly terms, that there was no evidence of any previous malice on the part of the prisoner towards the deceased, and that none could properly be inferred from his subsequent conduct, especially when it was considered that he was then highly excited by the use of ardent spirits, and that, consequently, there was nothing to show that the prisoner did not act upon the provocation, which he received.

The counsel for the State, after insisting that the testimony of Mrs. Flowers was true, contended that if the case stood alone upon the testimony of Robert Flowers, there was no legal provocation for the killing, that the throwing of the chair by the deceased was not, under the circumstances, a legal provocation; but if it were, the prisoner did not act under its influence, but acted from malice towards the deceased, and this was to be inferred from his language and conduct towards the deceased, after he came to his house and up to the time of the fatal deed, and also from his language and conduct after he had killed the deceased.

They contended further, that the testimony of the Messrs. Manly was also to be considered, not in the light of threats towards the deceased, but as showing, in connection with other circumstances, the motive by which the prisoner was actuated, when he killed the deceased.

The Court charged the jury upon the testimony of Robert Flowers, that if the parties were upon friendly terms up to, and at the time when the deceased rose up, raised his chair, and threw it at the prisoner, the throw-

ing of the chair by the deceased, was such a violent assault as made it a legal provocation, and if the prisoner, then acting under the provocation, drew his knife, rushed upon the deceased, and stabbed him, the killing was not a killing upon malice, but upon a legal provocation, and it would be the duty of the jury to acquit him of the charge of murder, and find him guilty of man-slaughter only. But the provocation could not avail the prisoner, if they found that he did not act upon it, but acted upon malice; and, in ascertaining his motive, they had a right to consider his conduct towards the deceased, previous to the killing, and also his language and conduct subsequent to that event.

That the testimony of the Manlys' did not show such malice towards the deceased in particular, as made it necessary for the prisoner to prove a reconciliation, in order to prevent the presumption of malice, continuing up to the time of the killing, according to the doctrine in *Madison Johnson's case*, but the jury might consider it in connection with the other circumstances of the case, including the conduct and declarations of the prisoner, after the death of Flowers, to show whether the prisoner acted upon the provocation, or with malice.

The prisoner was convicted of murder. A motion for a new trial was submitted, because the Court instructed the jury, that they might consider the testimony of the Manlys' and also the testimony in relation to the language and conduct of the prisoner on the night of the homicide and after it was committed, as ascertaining whether he acted upon legal provocation, or upon malice towards the deceased.

Motion over-ruled. Sentence of death pronounced and appeal taken.

Attorney General, for the State.
Badger, for the defendant.

Ruffin, C. J. The prisoner lost no advantage by not objecting to the admissibility of the testimony of the Manlys', as the counsel for the State, in the opening, stated an expectation to prove, that the killing was upon express malice. To that purpose, that evidence was material, if the jury, from it and other circumstances, inferred that Flowers was the person, or one of the persons, whose life the prisoner threatened; and it would be the stronger, the more frequently the threat was uttered, and the greater the length of time through which it was repeated, as tending to show that the prisoner's mind had brooded over vengeance, and that he deliberately purposed to have the other's blood.

But, after getting in the evidence in that way, the Solicitor, in using it before the jury, distinctly admitted that the threats were not directed towards the deceased, and he could not well have contended otherwise, in the absence of any evidence of ill-feeling between the parties, and after full evidence of the friendly relations that had subsisted between them. He, however, urged, that though the deceased was not the object of them, those threats, (amongst other things) "showed the motive by which the prisoner was actuated when he killed the deceased." And in reference to that position, the Court, after expressing the opinion, that, according to the evidence of the lad, Robert Flowers, there was a legal provocation, directed the jury, that the testimony of the Manlys' did not show malice towards the deceased in particular; but that, nevertheless, "they might consider it, in connexion with the other circumstances, to show, whether the prisoner acted upon the provocation, or with malice." The question before this Court is, whether that direction was right or not? We think it was not; because that was not such evidence as would authorise the finding, that the killing was upon malice, and not upon the provocation, and, therefore, that it was erroneous to leave the point to the jury on it.

As the question comes before this Court, it is to be assumed that Mrs. Flowers was discredited, and that the case, as to the incidents of the combat, stood upon the evidence of the son. Upon that state of the case, the Court told the jury, that there was legal provocation, which palliated the killing to man-slaughter, provided, only, the prisoner acted on it. If he did not, then indeed, it followed, that the killing was, in a legal sense, on malice against the prisoner, and amounted to murder, as there was no circumstance of accident or necessity to excuse or justify it. The essential enquiry, therefore, was, whether there was any motive for the mortal assault, besides that arising out of the admitted provocation.

Upon that question, the circumstances, that the prisoner was approaching the deceased, when the latter rose from his chair, and that he did not, when he threw the chair, touch the prisoner, nor, as the witness believed, intend to do so; and that the deceased in throwing the chair fell, and the prisoner rushed on him, and stabbed him while down; and also, that the deceased got up and retreated, and the prisoner then pursued him and continued to stab him; those circumstances, together with the prisoner's deportment and language to the family of the deceased and respecting the homicide, were very properly submitted to the jury, as material to be weighed by them, upon the enquiry just mentioned. Upon their weight legally, or as authorising an inference of fact, as to the state of the prisoner's heart at the time of giving those stabs, it is not our province now to give an opinion; and we wish to be understood as carefully refraining from the intimation of one. We only mean to say, that those were proper subjects for the consideration of the jury upon the point before them. But the instruction added to those circumstances this other, as also proper for their consideration on that enquiry; namely, that a year before, and also a month before the homicide, the prisoner declared his intention to kill two or three men—it being

at the same time admitted, that the prisoner had no reference to the deceased, but that he meant other men. Now, that is saying, that it may be inferred, notwithstanding a present sufficient provocation, that the prisoner killed one person on express malice—a previous design, or set purpose to do so—because, a year and a month previously, he declared that he had a mind to kill another person. The declaration of an intention to kill another, certainly cannot stand higher, as evidence of an unprovoked purpose to kill Flowers, than the actual killing of that other. If we suppose, then, that the Manlys' had been offered to prove, that, a year and a month before this killing, they had seen the prisoner wantonly stab a man to death, it is clear that evidence could not have been received. The one transaction would be entirely distinct from the other. It would be altogether irrelevant to the point, whether the prisoner stabbed the deceased; and not less so to the enquiry, on what motive did he stab him. If proved, it would, of itself, be *no* evidence of this killing, or the *quo animo*, on which the Court could leave a case to the jury; and it would be equally inconclusive, and therefore calculated to mislead the jury, when left to them, in aid of other evidence, on those points. It would, in effect, be giving the prisoner's general character in evidence against him; or even worse than that, as this is particular evidence (which the prisoner would not be prepared to answer) of an evil disposition towards certain persons formerly, as the foundation of a presumption, that the prisoner afterwards killed another person *malo animo*, instead of having done so, on an immediate provocation proved.

It is true, that there are cases, in which the killing is murder, though there was no intention to kill the deceased in particular. But they all stand upon entirely different grounds from the present. The cases alluded to are those, in which a person shoots at one man upon malice towards him, and happens to miss him, and kill

another; or if he lay poison for one, and another ignorantly take it, and die; or discharge a gun in a crowd, and kill some one, though not directed to any one in particular; or, with the intent to steal it, shoot at an ox and kill a man; such cases are, all, murder. But in each of them, there is, at the instant of the act done, from which the death ensues, an intent to commit a felony, and an intent to commit it by that very act. The law, therefore, holds the perpetrator responsible for all consequences, which flowed from that act, and treats him as if he had actually intended to do, what he happened, in execution of that purpose, to do. But, this man, Flowers, was not killed in any effort of the prisoner to slay either of the other men, against whom he had been harboring malice, as declared by him to the Manlys. The enquiry, in this case was, therefore, the strictly limited one, whether the killing was upon malice to the deceased. That could not rationally be inferred from an evil disposition towards other persons, however long and firmly cherished by the prisoner; and therefore, according to our law of evidence, and mode of trial in criminal cases, that evidence ought not to have been received; or, after it was received under the circumstances in this case, it ought not to have been given in charge to the jury as matter, which tended to repel the presumption, that the prisoner, in killing Flowers, acted on the provocation, which he then received.

Per Curiam. Ordered that this opinion be certified to the Court below that they may proceed, &c.

JOHN GILCHRIST, JUN. *vs.* ARCHIBALD D. McLAUGHLIN.

The plea of *liberum tenementum* in an action of trespass, q. c. f. admits the fact, that the plaintiff was in possession of the *close* described in the declaration, and that the defendant did the acts complained of, raising only the question whether the *close* mentioned was the defendant's freehold or not.

In a controversy about boundary, the plaintiff may give in evidence a recovery in an ejectment suit, twenty-five years ago, by one under whom the plaintiff claims against the defendant and the subsequent abandonment by the defendant of the land now claimed by the plaintiff.

A plaintiff may recover damages for a wrongful entry upon his land by a disseisor, although he may not have regained possession of his land at the time of the action brought.

Where a tenant claims by a disseisin, ripened into a good title by lapse of time, he must shew an actual, open and exclusive possession and use of the land as his own, *adversely* to the title of the demandant. It must be known to the adverse claimant or be accompanied by circumstances of notoriety.

Where a person intends to place his fence on a particular line, but accidentally places a small part of it on land claimed by another, this will not be a possession adverse to such claimant.

Where, in running a line, another known line is called for, and the distance gives out before reaching the line called for, the distance is to be disregarded.

The case of *Green* v. *Harman*, 4 Dev. 158, cited and approved.

Appeal from the Superior Court of Law of Richmond County, at the Spring Term, 1847, his Honor Judge BATTLE presiding.

The facts, on which the questions of law arose in this case, are stated in the opinion delivered in this Court.

Badger, for the plaintiff.
Strange, for the defendant.

DANIEL, J. This is an action of trespass *q. c. fregit*. The pleas are, "*liberum tenementum*," and "*not guilty*." The first plea admits the fact, that the plaintiff was in possession of the *close* described in the declaration; and

that the defendant did the acts complained of; raising only the question, whether the close described was the defendant's freehold or not. 2 *Greenleaf on Ev. Sec.* 626. But under the plea of "not guilty," the defendant may give in evidence any matters, which go to show that he never did the acts complained of; for example, that he did not enter the plaintiff's *close*; so, he may show, that the freehold and immediate right of possession are in himself, or in one, under whom he claims title; thus disproving the plaintiff's allegation, that the right of possession is in him. 2 *Greenleaf* 513. Under the first plea, if it stood alone, the plaintiff would have had to prove nothing but the amount of damages he had sustained; and the burthen of proving that the freehold was in the defendant (if the fact was so) lay upon him. Under the other plea *not guilty*, (the defendant may plead double) the plaintiff was driven to the necessity of sustaining by proof, the affirmative allegation in his declaration, that the defendant *broke and entered his close*, and built thereon his stables.

The eastern abuttal of the *close*, as described in the plaintiff's declaration, is Watson's line. The plaintiff, to show his constructive possession of the place, when the defendant entered and built his stables, began his evidence by exhibiting a grant, made to John McFarland for 150 acres of land, and dated the 18th of August 1787. The first line of the patent, ran to Smiley's corner, (Gulledge's grant of 1774, or 5,) then with, and beyond his line South 60, East 180 poles, to a stake among three pines *on Watson's line*; then, with and beyond it, South 35, West 125 poles; then North 67, West 184 poles to the beginning. The plaintiff then introduced a deed, dated on the 30th day of December 1816, from A. Nicholson to Angus Gilchrist, for the same land, and described by the same boundaries. He then proved, that A. Gilchrist entered and possessed the said lands up to his death, in the year 1834, when he devised it to his son

James Gilchrist, who took it into possession. James Gilchrist conveyed the same land to the plaintiff, John Gilchrist, by deed, dated the 20th day of January, in the year 1840, who entered and possessed it, up to the commencement of this action.

The distance called for, in the plaintiff's second line, gives out before it reaches Watson's line as contended by the plaintiff; he, however, insisted, that he had a right to go to the *Watson line*, called for in his title deeds; and he offered witnesses to prove, that it had been so reputed and understood for a long time. The defendant objected to parol evidence, as inadmissible to establish where Watson's line ran, before the plaintiff had laid a foundation for such evidence, by showing some written document, that Watson ever had a line for any land in that neighborhood, and he insisted, that the plaintiff should be non-suited in case of his inability to produce some written document to that effect. The Court, however, refused to non-suit the plaintiff, and let in the parol evidence. We think that the defendant has no right to complain of this; because, independent of the plaintiff's right to prove a line of Watson by reputation, the Court had no right to non suit, if the plaintiff was willing to risk a verdict against him. The defendant did not, however, rely upon an error in that decision, and stop his case. He proceeded and exhibited a grant for a 100 acre tract of land to one Thomas Gaddy, dated in the year 1773, and a deed for the same lands from T. Gaddy to *Alexander Watson*, dated in the year 1776, and thus, himself, showed a line of Watson, as called for. Both parties, then admitted, that the call for *Watson's line*, in the plaintiff's title deeds, must be the Western boundary line of the Gaddy grant. And where that Western line ran, or lay, was the bone of contention between the parties.

The plaintiff insisted that the red dotted line, designated as X. N. Y., was the true Watson line. And the defendant, (who had married Watson's daughter, and had pur-

chased of him, the two tracts of land mentioned on the plot, *to-wit:* the Gaddy grant of 100 acres, and the Alexander Watson grant of 250 acres,) insisted that the black line, designated as running from black L. to 2, was the Eastern boundary of the John McFarland grant, and was the *Watson line* called for in the boundaries of the plaintiff's deeds. If his position was true, the *locus in quo*, would be the defendant's freehold. The land had been granted, and if the stables were within the boundaries of the plaintiff's title-deeds, then the long continued adverse possession of the John McFarland land, from 1816, to 1843, under colour of title, would bar McFarland and his heirs, and give a good title to the plaintiff. The plaintiff proved, that he had cleared a field of 30 or 40 acres, soon after he purchased the land in the year 1840, up to within eighty yards of the stables, and they were built by the defendant in the year 1843. The defendant then proved that he had a field, and had continued in possession of it, claiming under the colour of title he derived from Watson, for more than seven years.

He proved, that his field extended West of the red dotted line *N. Y.* To repel the force of this testimony, the plaintiff offered the record of an action of ejectment, which had been brought by Angus Gilchrist, as lessor of the plaintiff, against the defendant, in 1819 or 1820, in consequence of a controversy, that then arose between them, about the said boundary line, in which there was a verdict and judgment for the plaintiff. This evidence was objected to by the defendant, but was admitted by the Court. We think, that the Judge did right in admitting the evidence, for the purpose for which it was offered in this case. The land was described in the declaration in that suit, in the same manner as it is in the present declaration, and in the grant to McFarland; and on the recovery by Angus Gilchrist, the present defendant abandoned the land on the Western side of the line *N. Y.* as having been recovered in that suit, upon the ground

that *N. Y.* was the boundary between the parties; or, at least, the plaintiff so contended, and it was a proper question for the jury, whether the defendant had so abandoned, and if so, for what reason. For it would be an argument for the plaintiff upon the question of boundary, if the defendant had admitted as far back as twenty-five years, that the boundary was in truth as the plaintiff now claims. Now, to that end, it was material to give in evidence, the record of the former suit, in order to show for what land, and by what boundaries, the recovery there was, and thus satisfy the jury of the defendant's reasons, immediately after that trial, for removing his fence and placing it where he did.

The defendant contended, that the plaintiff could not maintain this action, though he had established his title up to the red dotted line *X. Y.*, because he had not regained possession of the *locus in quo* at the date of his writ. The Court said, that this action might be maintained for the first entry, if the plaintiff had a constructive possession of the *locus*, at the time the wrongful entry of the defendant was made, although he had not regained possession at the date of the writ. We concur in this opinion, and have given our reasons in *Smith* v. *Ingram & others*, decided at this term. The defendant also insisted that at the time the act complained of was committed, he was as much in possession as the plaintiff. The Court charged the jury, that, if the defendant, when he removed his fence, after the trial in the ejectment, intended to place it on the red line *X. Y.*, so as not to enclose any land West of that line, but did by mistake place it so as to include a part of the land West of that line, it would not avail to give him possession up to the line *H. I.* even if that was the boundary of the Watson grant of 250 acres. We see no error in this part of the charge of his Honor. Where the tenant claims by a *disseisin* ripened into a good title by lapse of time, he must show an actual, open, and exclusive possession

and use of the land as his own, *adversely* to the title of the demandant. It must be known to the adverse claimant or be accompanied by circumstances of notoriety. 2 *Greenleaf*, 5, 557. If the defendant intended to place his fence on the line and to abandon all the land west of that line, (which was a question proper for the jury,) then, the accidental circumstance of the labourers in erecting the fence, placing a small part of it west of the line, would not satisfy the requirements of the law, that the defendant's possession west of that line, must be *adverse* to the title of Gilchrist. *Green* v. *Harman*, 1 Dev. 158. The defendant insisted, that the plaintiff must stop at the termination of his distance, and then his eastern line must be the black line, L. 2, as there was no evidence of a Watson line in 1787, or at any period anterior thereto. Where another known line is called for, and the distance gives out before reaching the line called for, the distance is to be disregarded. The defendant is mistaken, when he says, there was no evidence of a Watson line in 1787, or before. For Watson purchased the Gaddy tract of land in 1776; and the lines of that tract, after that date, were called Watson's lines, as we learn from Watson himself, in his survey of his grant for 250 acres, surveyed the 10th of November, 1785. In that survey, the lines of the Gaddy land, are called Watson's lines. And whether this evidence was furnished on the trial by the plaintiff or the defendant, is now quite immaterial. The defendant insisted, that the line H. I. was the western line of the Watson grant of 250 acres; and that he had been in possession for more than seven years, of the lapped part, before the plaintiff took possession in the year 1840; and he contended that his seven years possession under Watson's grant, gave him a better title to the *locus in quo*, than the plaintiff.

The answer to this portion of the defence is, that the seven years possession by the defendant of the lapped part, could not be made out, without resorting to the

possession of the very small part of the land, that was by mistake, included within the defendant's fence, when he in fact intended, as the jury have found, to place it on the red line. That possession of the land by the defendant, inside of the fence west of the red line, was not an *adverse* possession, in the opinion of the Judge and jury; and a seven years possession (not adverse) never ripens the tenant's title into a perfect title. For an adverse possession is one taken exclusively and upon a claim to hold as his own against the true owner.

We cannot discover any error in the decisions of the Judge, unless it may be the admission, in evidence, of the judgment and execution against John McFarland: if, indeed, that be an error. The title deeds exhibited by the plaintiff, beginning with that from Nicholson, and the evidence of the continued possession from the year 1816 up to this time, gave him just as good a title, without the judgment and execution, as with them. They, therefore, were immaterial to the plaintiff's right to recover in this action; and being so, it is not necessary that we should decide on their validity, as their admission in evidence by the Judge was immaterial, and therefore founds no ground for a new trial.

Per Curiam. Judgment affirmed.

JAMES LEMIT TO THE USE OF BURTON HATHAWAY vs. JOHN FREEMAN.

When a Sheriff returns, that a writ came to his hands "too late to execute," the writ having been delivered to him more than ten, but less than twenty days before the term of the Court, he is liable to the penalty of five hundred dollars, prescribed by the Statute, *Rev. Stat. ch.* 109, *sec.* 18, for making a false return.

Appeal from the Superior Court of Law, of Chowan County, at the Spring Term, 1847, his Honor Judge CALDWELL presiding.

This is an action against the Sheriff of Bertie for $500 for making a false return of, "too late to hand to execute in time," on a *capias ad respondendum*, sued out from the Superior Court of Chowan by James Lemit to the use of Burton W. Hathaway against William H. Capehart, and George W. Capehart; and was tried on *nil debet* pleaded. The writ was delivered to the defendant, seventeen days before the term to which it was returnable, and the return was made in the defendant's name by his deputy. Upon evidence of those facts, given on the part of the plaintiff, the defendant insisted that the plaintiff could not recover: first, because he had not given evidence, that either of the Capeharts was an inhabitant of Bertie, or was in that County, while the defendant had the writ: and secondly, because the writ was not delivered twenty days before the sitting of the Court. A verdict was taken for the plaintiff, with leave to the defendant to move to set it aside and enter a non-suit, if for either of those reasons the law was against the plaintiff; and afterwards the Court, on the motion of the defendant, did set the verdict aside and gave judgment of non-suit, and the plaintiff appealed.

Heath, for the plaintiff.

A. Moore, for the defendant.

RUFFIN, C. J. If Hathaway had sued the defendant for not executing the writ, or for a false return of *non est inventus*, it would have been incumbent on him to allege and establish, that the defendants in the writ were in the Sheriff's County. But that circumstance has no application to an action for the penalty for such a return as this, which falsely alleges that the writ came to hand too late to be executed—even if the defendants therein were in the County.

The case therefore depends on the second point made on the trial; which is the only one which is argued here.

The Act of 1777, ch. 115, sec. 14, provides, that all writs in the Superior Courts shall be executed at least *ten* days before the beginning of the term, to which they shall be returnable; and that process executed at any other time shall be adjudged void on the plea of the defendant. *Rev. Stat. ch.* 31, *sec.* 53. The Act of the same year, ch. 118, sec. 5, enacts, that every Sheriff shall execute all writs to him directed, and make due return thereof under the penalty of £50 (fixed at $100 in 1821) for each neglect, where the process is delivered *twenty* days before the sitting of the Court, to which it is returnable, to be paid to the party grieved, by order of the Court on motion. The section then proceeds: "And for every false return the Sheriff shall forfeit and pay £50. (raised to $500 in 1836) one moiety thereof to the party grieved, and the other moiety to him or those who will sue for the same, and be, moreover, liable to the action of the party grieved for damages." *Rev. Stat. ch.* 109, *sec.* 18.

In the first place, it seems clear, that the return is false; for the writ was delivered in time to give the sheriff seven clear days, in which he might have served the writ. It did *not* "come to hand too late to execute *in time*." Indeed, the defendant's counsel admitted, that an action would lie on this return for the party grieved for his damages. He contended, however, that the penalty was not given in such a case; but that the correct

exposition of the Act is, that, as the first clause gives the amercement, for not making any return, only when the writ has been delivered twenty days, the second clause gives the penalty for the false return of only such a writ, as that before specified; that is to say, one delivered twenty days. But the language of the two parts of the section does not bear out that construction. The amercement is given expressly, and only, for not returning a writ, that had been delivered twenty days at least. The succeeding clause, which gives the penalty for a false return, is not thus expressly restrained to a writ, that had been thus long delivered; nor does it use the words, "such writ," or any other term of reference to the preceding provision. But in the most enlarged phrase it declares, that *for every false return*, the sheriff shall incur the forfeiture. If, however, the two cases of making no return, and of making a false return, stood on the same reasons, the Court, in order to effectuate the apparent legislative intention, would, probably, feel authorised to restrain, by construction, the general terms, used respecting the false return, to the particular case before specified, of a writ delivered twenty days. But the two duties are very different. It was well understood, that sheriffs could not return writs to various Courts in distant parts of the State, if the parties were at liberty to put them into his hands up to the last day. Therefore, the law does not give an amercement to one, who will not return it. But no such reason applies to a false return; for the fault in that case is, altogether, on the part of the officer. He may not be obliged to go to the Court or return the writ—at least, not under pain of amercement. But, if he does go there, and undertake to return the writ, he ought to return it truly. There is *no* reason why he should not. If he had served the writ, as he might, surely the law, although it would not fine for *not* returning it, would not leave it to him to return *cepi corpus*, or *non est inventus*, at his option. The Act never

meant to confer the privilege of falsehood in any case, though in some cases it would not fine for not making a return. Therefore, there is no ground, on which the Court is at liberty to disregard the words of the statute, by holding that the forfeiture is not incurred by "every" false return.

Some doubt was at first entertained, whether this return of "too late to hand" was in its nature such an answer to the writ, as to amount to one of those returns, which the Legislature meant. But upon consideration we think it is. It is a recognised return, and has long been. *Com. Dig. Retorn D.* 1, F. 2, 3. If false, it works a prejudice to the party, like other false returns. Indeed, one of the objects of the St. 13, Ed. 1, ch. 39, was to give a remedy for falsely making this return of *Tarde*. After reciting that Sheriffs will not return writs, and also that they return them falsely, it provides, that "such as do fear the malice of Sheriffs shall deliver their writs in the open County, and may take of the sheriff or under-sheriff a bill, wherein the names of the demandants and tenants mentioned in the writ shall be contained, and that the seal of the sheriff or under-sheriff shall be put to the bill for a testimony, and that mention shall be made of the day of deliverance of the writ: And that, if the sheriff will not return writs delivered to him, and it be found by inquest before the parties of assize, that the writ was delivered to him, then damages shall be awarded to the plaintiff or defendant:" "And by this mean," it is added, "there shall be remedy, when the sheriff returneth, that the writ came too late, whereby he could not execute the King's command." So it appears clearly enough, that this is one of those false returns anciently complained of, as being made by the malice of sheriffs, and remedied by Act of Parliament. Other parts of our Act of '77, which require the sheriff to mark on the process the day he received it, and giving the forfeiture and damages for a false return, have the same purpose. It is said, indeed,

by Chief Baron CONYNS, that *Tarde* is not a good return upon a *capias ad respondendum*. He cites no authority for the position, and assigns no reason for it; though, doubtless, it may be received as law in England upon his authority alone, and the reason may lie in the nature of that writ there. But, as by our Statute, it is expressly made the leading process, and the day of its delivery is to be marked on it, and a time is limited for its execution, it is, we think, within the meaning of that part of the Act of '77, which makes it penal on the sheriff to make a false return of a writ.

The judgment therefore must be reversed, and judgment entered for the plaintiff according to the verdict.

PER CURIAM. Judgment reversed and judgment for the plaintiff.

THE STATE *vs.* GEORGE, A SLAVE.

The acts and declarations of an accomplice are evidence when they are part of the *res gesta*, and done in furtherance of the common design.

But to make the acts or declarations of another, evidence against a prisoner, a conspiracy or common design between them must be established.

Appeal from the Superior Court of Law of Granville County, at the Spring Term, 1847, his Honor Judge MANLY presiding.

The prisoner was separately tried upon an indictment, in which he was charged as principal, and Mary Meadows as accessary before the fact, with the murder of

James Meadows. In the course of the trial, a witness for the State, having been examined as to some other matter, was then interrogated by the Solicitor for the State, as to the acts and declarations of Mary Meadows, tending to show hostility to her husband, and an intention to cause some great bodily injury to be inflicted upon him. This was objected to by the prisoner's counsel, but the Solicitor stating at the same time, that he then intended to call witnesses to prove a conspiracy between Mary Meadows and the prisoner, it was admitted by the Court.

Evidence was then introduced to shew a guilty connexion between the prisoner and Mary Meadows, which it is not thought necessary to repeat.

In another, and subsequent stage of the cause, after a recess, and before re-commencing the examination of witnesses, the prisoner's counsel, addressing the Court, remarked, they supposed it was unnecessary to repeat the objection already made, to evidence. To which the Court replied, it was deemed unnecessary; that objection would be considered as made to all testimony of the same kind. If they desired, however, to make a point as to the admissibility of other evidence upon other grounds, it ought to be mentioned.

No exception is taken to the instructions given to the jury. There was a rule for a new trial, on account of improper testimony. Rule discharged. Judgment and appeal.

Attorney General, for the State.

Badger, *E. G. Reade*, and *Gilliam*, for the defendant.

NASH, J. The prisoner is indicted, together with Mary Meadows, for the murder of James Meadows, her husband, the first as principal, and the second as accessary before the fact. The prisoner was tried alone. On the trial a witness was called to state, "acts and declarations

of Mary Meadows, tending to show hostility to her husband, and an intention to cause some great bodily injury to be inflicted on him." Objection being made, on behalf of the prisoner, the prosecuting officer stated, he intended to introduce witnesses to prove a conspiracy between the prisoner and Mary Meadows. The evidence was admitted by the Court. *What* these acts were, or what were the declarations of Mary Meadows, the case does not inform us, any further, than that they *tended* to show, the state of *her* feelings towards the deceased. An accomplice is certainly a competent witness, either for or against a partner in the perpetration of the offence, if he be not a party to the record; and if he be, his declarations will be heard, under certain restrictions. A simple bald declaration will not be received, unless it be, in itself, an act; as in treason, to make it evidence, it be accompanied by an act, of which it is explanatory; for which act. his accomplices are responsible; and the declaration must be a part of the *res gesta*, and be done in furtherance of the common design. *The American Fur Company* v. *United States*, 2d Peters 364. *Gooding's case*, 12 Whe. 460, 1 Phil. on Ev. 414, 4th, Haw. P. C. Book 2nd, ch. 46, sec. 34. *Cabiness* v. *Martin and others*, 4 Dev. 110. 1*st Greenleaf's Ev.* 345. *State* v. *Poll. & Lavinia*, 4th Haw. The declarations and acts of Mary Meadows had none of the qualities, rendering them evidence against the prisoner. The acts, as far as the case discloses, were not such as he was answerable for, nor were they done in furtherance of the common design, to wit: to murder James Meadows. They were descriptive, simply and entirely, of her feelings towards her husband, without pointing in the most remote manner to the prisoner. For this reason, if there was no other, I should send the case back to another jury.

But there is another, and still more formidable objection to the sustaining of the verdict, in this case. The prosecuting officer, when he offered in evidence these acts and

declarations of Mary Meadows, was sensible, that, at that state of the case, they were not admissible; to make them so, he declared his intention to prove a conspiracy, and it is to be presumed, such a conspiracy, as would authorise their introduction. The prisoner was on trial for the murder of James Meadows, and the conspiracy to be proved, was one to effect that crime; and so the Court must have understood it. Does the *case* show, that *any* conspiracy was proved? It states, "that evidence was then introduced, to show a guilty connexion, and that it was not thought necessary to go into particulars." It appears, that, after the introduction of this testimony, the Court took a recess, and upon resuming the trial, the prisoner's counsel renewed his motion; or, rather, informed the Court, that he had not abandoned it, and the evidence was not withdrawn from the jury. Whatever doubt might rest upon the admissibility of the acts and declarations of Mary Meadows, as proved, coupled with evidence of a conspiracy, to my mind it is perfectly clear, that, as the case appears here, they were not admissible. The words, "guilty connexion," have no definite meaning, as descriptive of any particular offence. The combination of a parcel of smugglers is a guilty connexion; so, to rob, or to commit an assault or battery, or to strike for higher wages, all these, are guilty connexions, punishable by law. But the words, in common parlance, when applied to a man and woman, mean a carnal connexion. If A. charge B. a woman, with having a guilty connexion with C. ninety-nine men, out of every hundred, will understand it, as a charge of incontinence on the part of B. And if the words were introduced into a declaration for slander, with proper averments, no jury would hesitate to hold them slanderous. And we are required to hold that these vague expressions show, that a conspiracy to murder James Meadows existed between the prisoner and Mary Meadows, for it is the only ground upon which her acts and declarations were, or could be, held admis-

sible. It is precisely, as if the State, after promising to prove the existence of a conspiracy, had offered no evidence of it. In such a case, it cannot be denied, that the admission of the declarations would be illegal and erroneous. The State did not redeem its pledge; it did not prove a conspiracy, of any kind, and there *was* error in the admission of the declarations of Mary Meadows. It is, however, objected, that the prisoner cannot now avail himself of the objection, as he has not put it into his bill of exceptions. This is a Court of errors, and the proper way to bring cases here for our consideration, is by a bill of exceptions; but for the convenience of all parties, the statement of the case, under the sanction of the Court, is received in the place of a bill; and it is true, we can take no notice of any objection, which is not stated in the case, or does not appear upon the record, properly so called. The prisoner's objection does appear upon the face of the bill tendered by him, as I understand it. Whether there was such a conspiracy, as would legalise the acts and declarations of Mary Meadows, as evidence against the prisoner, was a preliminary question of law and of fact, to be decided by the presiding Judge. With the errors committed in adjudging the facts, submitted to him, we have nothing to do; our business is only with errors of law. At the time, the evidence of the acts and declarations of Mary Meadows were received, it was admitted that it would not be evidence, unless a conspiracy was proved. The case does not show that any conspiracy was proved, but, in its place, a guilty connexion, which might, or might not, be evidence of one, but assuredly was not one; and his Honor, in so deciding that it was, as we must understand from the case, as sent here, committed an error in law. It is no answer to say, that such could not have been, in fact, the decision of the Court. I cannot look to any thing which is not in the case; more particularly, when the life of a human being is at issue. If the case had stated, that a conspiracy to

murder James Meadows, was proved, the prisoner, so far as this question is concerned, would have been concluded; unless he had set forth in his exception, some legal objection to it—as that it was a conspiracy to commit some other crime; and the acts and declarations of Mary Meadows, in furtherance of the common design, would have been evidence against him. The case states, that, "it is unnecessary to go into particulars:" that is, of the guilty connexion; but the notes of the presiding Judge were sent up. I have not looked into them, as they constitute no part of the case. *Godwin's Case* 5th Ire. 403. It is objected, that these particulars ought to have been set out by the prisoner, in the case. I cannot see to what purpose or effect. To my apprehension, the prisoner has omitted nothing it concerned his interest to state. If a bill of exception does not state correctly the matter excepted to, the Judge is not bound to sign it; otherwise he is. Here, he has signed it, and we must consider it, as stating all that was necessary. It is further stated in the case, that the prisoner did not complain of the charge. No, the complaint is, that the declarations of Mary Meadows were admitted without proof of the existence of a conspiracy, which alone, could legalize them; and this appears, upon the face of the case. I have little doubt, that much more was proved at the trial, upon this particular point, than is stated in the case, but I must decide it as it is; I cannot look out of the bill of exceptions.

When the declarations were first offered, they were objected to; and when the guilty connexion was proved, the motion to reject them was again renewed in substance. What more the prisoner could do, I cannot perceive. It appears to me, he did all, through his counsel, it was necessary or proper for him to do, to bring his objection before the Court. It surely was not necessary for him to ask for an instruction from his Honor, that these acts and declarations of Mary Meadows were not evidence against

him. His Honor had already decided that they were. I consider the declarations and acts of Mary Meadows, as given to the jury, without proof of any conspiracy between her and the prisoner; and, in this there was error.

In my opinion, the prisoner is entitled to a *venire de novo*.

DANIEL, J. As to the prisoner's liability to be affected by the confessions of others, it may be remarked, in general, that the principle of the law in civil, and criminal cases, is the same. In civil cases, when once the fact of agency or partnership is established, every act and declaration of one, in furtherance of the common business, and until its completion, is deemed the act of all. And so, in cases of conspiracy, riot, or other crime, perpetrated by several persons, when once the conspiracy or combination is established, the act or declaration, making a part of the *res gesta*, of one conspirator or accomplice in the prosecution of the enterprise, is considered the *act* of all, and is evidence against all. Each is deemed to assent to, or command, what is done by any other in furtherance of the common object. But after the common enterprise is at an end, no one is permitted, by any subsequent act or declaration of his own, to affect the others. 1 *Greenleaf's Evi.* 233. *State* v. *Poll and Lavinia*, 1 Hawks, 442. *United States* v. *Gooding*, 12 Wheat. 459. 2 *Peters' Rep.* 358. 2 *Stark. Evi.* 232, 237. *Roscoe on Evi.* 60. The State, had, first, to establish a conspiracy between the prisoner and Mrs. Meadows, to murder Meadows, before any evidence of declarations of hers, were admissible against him. The case states, that evidence was introduced to show, "*a guilty connexion* between the prisoner and Mary Meadows, which it is not thought necessary to repeat." How then can we see, or say, that any conspiracy ever existed between the prisoner and Mary Meadows to murder the deceased, or

to do him some great bodily harm." "*A guilty connexion*"—what about? what do these words mean? I must confess I cannot tell. I cannot say that a combination or conspiracy between them, to kill the deceased, is the plain meaning of the aforesaid words. And without a combination or conspiracy, between the prisoner and Mary Meadows, to kill or do some great bodily harm to the deceased, the acts or declarations of Mary Meadows, relating to that subject, could not lawfully be given in evidence against the prisoner. The prisoner moved for a new trial, because the Court permitted the declarations of Mary Meadows (without oath, or an opportunity of cross-examination,) to be given in evidence against him. The State replied, that there was "evidence introduced to show *a guilty connexion* between you and her." Can this answer be a satisfaction of the previous requirements of the law, before acts or declarations of others, are admissible, as evidence against a prisoner? I think not, and am of opinion, that a new trial should be granted.

It is said, that it was the prisoner, who tendered the bill of exceptions; and it was his duty to state the fact, (if it was a fact) that the declarations of Mary Meadows were admitted in evidence against him, when no combination between her and him, to kill the deceased, had been established. And, I ask, if he has not done so? If there had in fact been a combination to kill, proven on the trial, then the Judge ought to have refused to sign this bill of exceptions.

Ruffin, C. J. I think there ought to be a *venire de novo*, upon the ground, simply, that the acts and declarations of the woman, which were given in evidence, are not of such a nature, as can affect the prisoner. To make the acts and declarations of one person, those of another, or to allow them to operate against another, it must appear,

that there was a common interest or purpose, between them; as applied to the case before us, that there was a conspiracy to murder the deceased, formed between his wife and the prisoner. But, that is not all which ought to appear; before the acts or declarations of one of the conspirators can be received against another, it must be shown, that they were acts done and declarations uttered, in furtherance of the common design, or in execution of the conspiracy. They must be acts and declarations of the one, that were authorised by the other, or such as became necessary in the prosecution of the joint business or criminal conspiracy. It has, indeed, been held in this State, that the declarations of one of the parties, unless they accompany acts, so as to come within the rule of *pais res gestal*, can only be received against himself. *Poll & Lavinia's case*, 1 Hawks. 442. But, admitting that to be too strict a rule, no case has carried the doctrine further than has been just mentioned; that is, that the acts and declarations must be such as relate to the common business, or purpose, and in furtherance of it. Now, this evidence does not appear to be of that character. I do not deem it material, or, rather, so indispensable, that the conspiracy should have been established in the first instance, that the judgment should be reversed on that ground merely. Though that is the more natural, and convenient order of proof, it would be sufficient to support the conviction, if it was made to appear on the trial; so as to show that, on the whole, there was no prejudice to the justice due the prisoner. But, supposing a conspiracy to murder the deceased to have been shown in this case? That does not seem to be any such connexion between that conspiracy, and the evidence given of the woman's act, and declarations, as conveys to the mind the slightest impression, that they were in furtherance of the common purpose. If, for example, a conspiracy between these persons appeared, for having the deceased murdered; and then Mary Meadows had procured another person to

do the deed, that act of her's and any instructions she gave for the mode of executing it, might be evidence against the prisoner. But, the evidence, in this case, was entirely of a different kind; being nothing more than naked indications of her personal hostility to her husband, and, of her intention to have great bodily harm done to him. It cannot be seen that those acts or declarations were calculated or designed to bring about the killing of her husband, or, in any manner, furthered the common purpose between the prisoner and herself.

On this ground, I think the judgment erroneous. I own that, I am entirely of a different opinion from that of my brethren, as to the consequences of the deficiencies in the bill of exceptions. It is to be recollected that this is a Court of errors, and that every verdict and judgment prove to us their own correctness, until the contrary appear. There is no *case* sent here, no report of evidence, on which we are to see all the facts set forth, that are legally sufficient to authorise the judgment given. But it lies upon the appellant to allege an error, and then to set forth, in his exceptions, such of the facts of the case, as will show the opinion to which he objects, to be erroneous in point of law. The bill of exceptions is the production of the appellant, and contains his words, with the signature and seal only, of the Judge to verify it. Thus looked at, it seems plain to me, when the prisoner's exception says, that evidence was given to shew *a* guilty connexion between him and Mary Meadows that, in common fairness to the presiding Judge, and to the State, we must understand him to admit, that it establishes *the* guilty connexion before spoken of in the exception, that is, one to murder Meadows. What other can be imagined, in reference to this accusation? That, as it strikes me, must be the just interpretation of that expression, if it stood alone. But the conclusion is irresistible to my mind, when the prisoner further states in his exception, that he does not think it necessary to set out the evidence of that

connexion. For what else can be inferred therefrom, than that the evidence legally established a guilty connexion between the woman and himself, and *that it was such a guilty connexion as was relevant to this trial, and to the question of evidence raised by him on the trial?* I agree that the statements in the exception are very imperfect, and unsatisfactory: such as will not enable us to see distinctly whether the decision was right or wrong. But whose fault is that? Very clearly, the prisoner's. It would have been much more correct to have stated in the exception, for example, what were the acts and declarations of Mary Meadows, that were given in evidence, instead of saying merely, that they were acts and declarations, tending to show hostility; and so of the particular conspiracy alleged, and of that conspiracy, (or connexion, as it is called) which was proved. But the prisoner declined, expressly, to have that latter evidence set forth; and, surely, in a Court of error, he cannot complain, that it was not stated, nor insist that, if stated, it would have proved merely a case of *crim. con*, or any other connexion not relevant to the question then raised. The truth is, that even the counsel at the bar, though the same who tried the cause in the Superior Court, did not suggest such an idea; but insisted only on the two points, that it was error to receive the evidence of Mrs. Meadows' acts and declarations; first, because they did not grow out of or concern the common purpose of the prisoner and herself; and secondly, because they were admitted *before* the State had proved the conspiracy to kill the husband.

I think, if this were a civil action, no one would doubt, that it was not a case for reversal, merely because the appellant had not set forth the evidence given to show the kind and extent of the connexion between these parties. He would be told, that, if he chose to keep that in the dark, the judgment could not be reversed, if there *could* be *any* guilty connexion, that would justify the ad-

mission of the evidence; because, it was incumbent on him to show affirmatively an error. It is the same in criminal, and even in capital cases; for the Statute puts all cases upon the same footing; there being no means of bringing up *any* cause to this Court, but by bill of exceptions and appeal thereon.

Supposing, then, the other point in the case to have been against the prisoner, I could not have united in reversing the judgment, because the prisoner declined stating the evidence, or used the vague expression, "guilty connexion"—if, as the case stands, it can be deemed vague. But upon the first ground, I concur in reversing the judgment.

PER CURIAM. Judgment reversed, and *venire de novo*.

HOUSER AND WILSON *vs.* HENRY G. HAMPTON.

The plaintiffs sued out a writ against James Bowles, which was returned "*non est inventus*;" the plaintiffs in their joint names may sustain an action for a false return, both as informers or as the parties grieved.

The ignorance of a sheriff's deputy, who makes a false return, if in fact it was false, does not excuse the sheriff from the penalty.

When a defendant in a writ is openly and at large in a County, *non est inventus* is a false return; and, if he cannot be taken elsewhere, the statute requires, that the sheriff shall go to his place of residence, before he makes that return.

If a sheriff, who has *mesne* process in his hands, finds the defendant and really endeavors to arrest him, and is prevented by any sufficient cause, or if, after arrest, the defendant is rescued, he should return the facts in excuse for not taking the body, and not return generally *non est inventus*, contrary to the fact.

Rescue is a good return in excuse, and the sheriff may return, that he did not take the body, because he was kept off by force of arms.

The sheriff is not obliged to summon the power of the County upon *mesne* process.

What is an excuse to the sheriff for not making an arrest is matter of law, after the facts are ascertained.

The case of *Crumpler* v. *Glisson*, No. Ca. Term Rep. 79, cited and approved.

Appeal from the Superior Court of Law of Surry County, at the Spring Term, 1847, his Honor Judge SETTLE presiding.

The action is debt for the penalty of $500, for making a false return of "not found," to a *capias ad respondendum*, at the suit of the present plaintiffs against James Bowles. Plea—*nil debet*.

On the trial, the defendant insisted, that the plaintiffs could not unite in this action; but the Court held otherwise. It then appeared in evidence, that the writ was delivered to a deputy of the defendant, and that, while he had it in his possession, he saw Bowles and had a conversation with him in Surry, "and attempted to arrest him, but failed to do it;" and that he then delivered the writ to another deputy of the defendant, without inform-

ing him of the previous transaction; and that the latter deputy went twice to the house of Bowles, for the purpose of serving the writ, and did not find him there, though on one of the occasions, he saw Bowles at a distance, but could not get near him; and, that, without consultation with the defendant, he then made the return, "not found."

The Court instructed the jury, that if they were satisfied the deputy, who first had the writ, made reasonable efforts to arrest Bowles, and that the return was made by the other deputy without any knowledge of what had been done by the former, then they should find for the defendant. Verdict for the defendant and appeal.

Boyden, for the plaintiffs.

No counsel for the defendant.

RUFFIN, C. J. The action, we think, lies for the two plaintiffs. The act gives the penalty, one moiety to the party grieved and the other moiety to him, *or those* that will sue for the same. These plaintiffs fill both characters, and are entitled to the whole recovery.

It was not correct, that the defendant's liability depended at all upon the ignorance of the deputy, who made the return, of its falsehood, if in fact, it was false. That might, perhaps, affect the liability of that deputy, if the defendant sought a recourse on his deputies for a loss sustained by him in the premises. But, as between the plaintiffs and the defendant, the return is that of the defendant; and, as he is liable for the acts and omissions of his deputies, the return is to be considered, as having been made by himself with all the knowledge of the facts possessed by both or either of the deputies. It is his fault to have deputies, who will not communicate, the one to the other, such acts of the one, as are material to a return, which the other is to make; and the sheriff cannot be excused for a false return, by the belief of a deputy, who made it, that it was true. That, however,

is not of so much consequence in the case, if the return be such as ought to have been made—that is, was true.

Upon that point, the opinion of the Court is for the plaintiffs. When the defendant in a writ is openly, and at large in the County, *non est inventus* is a false return; and, if he cannot be taken elsewhere, the Statute requires moreover, that the sheriff should go to his place of abode before he makes that return. In this case, however, the party was actually found by the deputy, who had the writ, and he conversed with him, as we must take it, at the ordinary distance and in presence of each other. It is stated, indeed, that there was evidence, that the deputy, "attempted to arrest Bowles and failed." We are not informed what were the efforts to make the arrest, nor why they were not successful. But the facts, as stated, do not justify the return as to its truth in fact. It may be admitted, he was not obliged to return *cepi corpus* upon those facts. Yet, certainly, he could not truly return *non est inventus*, any more than he could have done it, if he had actually taken Bowles, and he had been rescued. As the sheriff's returns cannot be traversed, and the only remedy for a false return is by action, it is right that returns should be required to be made strictly according to the facts. If then, the deputy, after finding Bowles, really endeavored to arrest him, and was prevented by any sufficient cause, the defendant should have returned the facts in excuse for not taking the body, and not return generally *non est inventus*, contrary to the fact. Rescue is a good return in excuse. *May* v. *the Sheriff of Middlesex*, Cro. Jac. 419. And it is held here, that the sheriff may return, that he did not take the body, because he was kept off by force of arms. *Crumpler* v. *Glisson*, N. C. T. R. 79. For the sheriff is not obliged to summon the power of his County upon *mesne process*. But we do not see, here, any facts that could have excused the failure to arrest Bowles. They ought to have been set forth, so that the Court could judge of their sufficiency. It was

erroneous to leave that question to the jury, as a general enquiry, whether, in their opinion, the officer made reasonable efforts to make the arrest; for, what is an excuse in such a case, is matter of law, after the facts are ascertained. Perhaps, there may have been a case, upon which the Court, to which the writ was returnable, might with propriety have been applied to for leave to amend the return. But, in this action, however hard, the sole enquiry is, whether the return, as it stands, be true or false, and, it is not competent to the jury, to palliate the falsehood, by weighing excuses for not fully executing the writ. The judgment must, therefore, be reversed, and a *venire de novo* awarded.

Per Curiam. Judgment reversed and *venire de novo*.